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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CLEROW WILSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1983

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CLEROW WILSON,

Respondent.

QUESTION PRESENTED FOR REVIEW

Is there a "seizure" within the meaning of the Fourth Amendment when a police officer approaches a traveler at an airport, identifies himself as a police officer, requests a minute of time to talk to that person to which the person agrees, and then explains that he is conducting a narcotics investigation

and has information that the person is carrying a lot of drugs.

LIST OF PARTIES TO THE PROCEEDING IN THE CALIFORNIA SUPREME COURT

1. Clerow Wilson, represented by Paul Moore, II, was the defendant in the trial court and petitioner before the California Court of Appeal and Supreme Court of the State of California.

2. The Superior Court of Los Angeles represented by the Office of County Counsel, Los Angeles County, was the respondent in the appellate courts below. No appearance was made in the appellate

courts below on behalf of respondent Superior Court of Los Angeles County.

3. The People of the State of California, represented by the Office of the Los Angeles County District Attorney, was plaintiff in the trial court and the real party in interest in the appellate courts below.

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OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 34 Cal.3d 777, 195 Cal.Rptr. 671, 670 P.2d 325. (See Appendix A.) The Opinion of the California Court of Appeal, Second Appellate District, Division 2 was reported in 134 Cal.App.3d 1062. (See Appendix B.)

JURISDICTION

The opinion of the Supreme Court of California was filed on October 20, 1983. A timely Petition for Rehearing was filed in the Supreme Court of California. The order denying the Petition for

Rehearing was filed by the Clerk of the Supreme Court of California on November 23, 1983. (Appendix C.) This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).[1]

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[1] The decision of the California Supreme Court suppressing all the narcotics in the case at bar which gave rise to all the charges against Mr. Wilson was based exclusively upon an interpretation of the United States Constitution. (Wilson v. Superior Court, supra, 34 Cal.3d at 791.) That decision by California's highest state court precludes further litigation on the federal claim, the finality of which now becomes conclusive. All that remains is dismissal of the case by the trial court since the Petitioner no longer has any relevant evidence to proceed with the prosecution. Once the evidence is suppressed dismissal follows and Petitioner is precluded from further appellate review based on both (1) law of the case (People v. Shuey (1975) 13 Cal.3d 835, 841) and (2) stare decisis. (People v. Triggs (1973) 8 Cal.3d 884, 890-891 [overuled on other grounds in People v. Lilienthal (1978) 22 Cal.3d 891, 896].) This Court recognizes that effective finality of judgment by a

The instant Petition for Writ of Certiorari is filed within 60 days of the order of the Supreme Court of California denying rehearing. (Rules of the Supreme Court of the United States, Rule 20.4; Rule 29.1.)

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state high court bestows jurisdiction upon this Court. (Cox Broadcasting Corp. v. Cohn (1975) 420 U.S. 469, 479-481; 95 S.Ct 1029, 1038-1039; 43 L.Ed.2d 328 on remand 214 S.E.2d 530, 234 Ga. 67; Miranda v. Arizona (1966) 384 U.S. 436, 498, n. 71; 86 S.Ct. 1602, 1640, n. 71; 16 L.Ed.2d 694, 10 A.L.R. 974, rehearing denied 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121; California v. Steward (1966) (decided with Miranda v. Arizona, supra) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; Mills v. Alabama(1966) 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484.) It appears that this Court has recently granted jurisdiction in a case procedurally comparable to the case at bar. (Michigan v. Clifford, et al. (Filed January 11, 1984, ___ U.S. ___, 84 Los Angeles Daily Journal D.A.R. 183.) Thus, this Court can properly accept jurisdiction in the case at bar.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment IV provides that:

> "The right of the People to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution Amendment XIV, Section 1 provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

STATEMENT OF THE CASE

Introduction

This case concerns an airport search whereby a police officer, acting upon information which did not provide probable cause for detention, approached Clerow Wilson at the Los Angeles International Airport and asked if he "might have a minute of his time." Upon receiving an affirmative response, the officer advised Mr. Wilson that he had received information that Mr. Wilson would be arriving from Florida carrying a lot of drugs, and asked consent to search Mr. Wilson's luggage. Consent was given and narcotics were recovered from Mr. Wilson's attache case.

Facts

On March 10, 1981 Officer Roy Kaiser of the Los Angeles Police Department was assigned to an undercover narcotics operation at the Los Angeles International Airport. (Reporter's Transcript [hereinafter "RT"] 115.) Officer Kaiser had worked exclusively narcotics suppression at the Los Angeles International Airport for the past four and a half years. (RT 167.) He testified to extensive training and experience. (RT 115.) Officer Kaiser was on that date generally monitoring the inbound flights from Florida which, based upon his experience, he recognized served as a conduit to channel illegal drugs into

California. (RT 119-120.) Officer Kaiser had prior information that Mr. Wilson might be arriving from Florida on that date (RT 120) but he had not expected to observe Mr. Wilson deplane from the particular Pan American Miami-Los Angeles flight which arrived at approximately 11:30 or 11:45 a.m. (RT 116-117, 119-120, 127-128.) When Mr. Wilson deplaned he was recognized by Officer Kaiser. (RT 128.) Wilson was carrying an attache case and was accompanied by an associate who was carrying a box which contained the name "Flip Wilson". (RT 119, 130.) Officer Kaiser observed Mr. Wilson and the associate look around inside the arrival area. The associate made eye

contact with the officer. (RT 120-121.) Officer Kaiser testified that this eye contact of looking around after deplaning from the flight was consistent with that of persons he had arrested in the past for transporting narcotics. (RT 121.) Officer Kaiser followed the two as they walked normally through the concourse (RT 138-139) and observed Mr. Wilson's associate look back over his shoulder in the direction of the officer and then immediately turn back and appear to speak to Wilson who turned his head to look back in the direction of the officer. (RT 122.) Mr. Wilson and the associate were met at the end of the concourse by a woman who was subsequently

determined to be Mr. Wilson's wife. (RT 122, 140.) The associate handed Mr. Wilson the box which was placed in a car parked by the curb and while the associate walked to the baggage claim area the other two remained by the car. (RT 122-123.) Officer Kaiser then approached Mr. Wilson who was then standing by the rear of the open trunk, displayed his police identification, told him he was a police officer, and asked if he might have a minute of his time. Mr. Wilson's response was "Sure". "What seems to be the problem?" (RT 124, 150.) Officer Kaiser told Wilson that he was conducting a narcotics investigation and that he had information that Wilson would be

arriving on that date from Florida and would be carrying a lot of drugs. (RT 124, 150.) The trial court excluded information received by Officer Kaiser from his partner, Detective Frederick, that Mr. Wilson was coming from Florida transporting a large amount of drugs. (RT 146-147, 176-177.) Officer Kaiser did testify, however, that he had not received other information that Mr. Wilson was engaged in illegal activity. (RT 128.) Officer Kaiser asked Mr. Wilson if he could search his luggage. Wilson responded "Sure". "I don't have any drugs that I know of. Go ahead and search." (RT 124-125.) Mr. Wilson placed the attache case on the rear seat of the

vehicle and opened it for the officer (RT 125, 153) who searched the case and retrieved small amounts of hashish (RT 126) and cocaine. (RT 127.)

Procedural History

Clerow Wilson was arrested and charged with possession of illegal narcotics in violation of California Health and Safety Code sections 11350(a) and 11357(a). The defense made a motion in the trial court to suppress the evidence. The motion was denied based upon the trial court's opinion that no illegal detention had occurred. (RT 251.)

The defense then filed a Petition for Writ of Mandate in the Court of Appeal of the State of

California, Second Appellate District, Division One. On August 20, 1982 that Court in a split two-one decision, certified for publication (Appendix B; 134 Cal.App.3d 1062), held that the police conduct was lawful under authority of both the United States Constitution and the Constitution of California.

The defense then petitioned for a hearing in the Supreme Court of California which, on October 30, 1983, in a unanimous opinion (Appendix A; 34 Cal.3d 777), overruled the decision of the courts below, and held that the narcotics were seized in violation of the Fourth Amendment of the United States

Constitution. The Supreme Court of California's opinion, which was based entirely upon its interpretation of the Fourth Amendment of the United States Constitution, as applied to the states (34 Cal.3d at 791), held that Police Officer Kaiser had illegally detained Mr. Wilson and therefore ordered the narcotics which had been recovered to be suppressed. (Id.) The Supreme Court of California based its decision upon its interpretation of this Court's opinions in Reid v. Georgia (1980) 448 U.S. 438, 65 L.Ed.2d 890, 100 S.Ct. 2752; United States v. Mendenhall (1980) 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870; and Florida v. Royer (1983) ___ U.S. ___,

75 L.Ed.2d 229, 103 S.Ct. 1319. (See Wilson v. Superior Court, supra at 34 Cal.App.3d at 783-791.)

REASON FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

WHERE A POLICE OFFICER, ENGAGED IN NARCOTICS SUPPRESSION, APPROACHES AN INDIVIDUAL, IDENTIFIES HIMSELF, ASKS FOR A MINUTE OF THE PERSON'S TIME AND UPON RECEIVING AN AFFIRMATIVE RESPONSE ADVISES THE INDIVIDUAL HE IS CONDUCTING A NARCOTICS INVESTIGATION AND HAS INFORMATION THE PERSON IS CARRYING A LOT OF DRUGS, THERE IS NO SEIZURE OF THE INDIVIDUAL UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court has consistently upheld the right of police to approach and address questions to

individuals in a public place. (Dunaway v. New York (1979) 442 U.S. 200, 210, note 12; Terry v. Ohio (1968) 392 U.S. 1, 31, 32-33, 34; United States v. Mendenhall, supra at 555.)

The lead opinion by this Court in United States v. Mendenhall recognized that no illegal "seizure" occurs even where an individual at an airport is asked by a law enforcement officer for an airline ticket and identification.

In Florida v. Royer, supra, where police approached the defendant at an airport, identified themselves, asked for a moment of time to speak with him, took his ticket and identification, and asked him to

accompany them to a police room without returning the ticket and driver's license, it was recognized that "had Royer consented to a search on the spot, the search could have been conducted with Royer present in the area where the bags were retrieved by Officer Johnson and any evidence recovered would have been admissible against him." (Id., 75 L.Ed.2d at 241.)

Reid v. Georgia, supra, did not reach the issue of whether the contact and questioning of a citizen at an airport was a seizure within the meaning of the Fourth Amendment. In Reid the petitioner had deplaned and a DEA agent approached, identified himself as a

federal narcotics agent, and asked to see airline ticket stubs and identification. The agent appeared to obtain consent for the search of the petitioner and his bags. However, on the way to the DEA office petitioner dropped his bags and ran from the officers. This Court held that the introduction of the evidence of the cocaine seized from the bag violated petitioner's Fourth Amendment rights. The California Supreme Court recognized in its opinion in the instant case, Wilson v. Superior Court, supra, that "Reid does not provide an answer to the detention issue. Although the holding that the circumstances known to the officer before he approached

the two suspects did not rise to the level of a 'articulable suspicion', the Reid court did not directly address the issue of whether the officers' conduct amounted to a 'detention' of the suspect or, if it did, at what point did the detention begin ...." (Id., 34 Cal.3d at 787.)

In the encounter in the case at bar, Officer Kaiser did not ask for nor obtain tickets nor identification. Officer Kaiser asked for a minute of Mr. Wilson's time. He identified himself. This was permissible. (Florida v. Royer, supra, 75 L.Ed.2d at 236; United States v. Mendenhall, supra, 446 U.S. 544, 555, 64 L.Ed.2d 497, 100 S.Ct 1870.) Mr. Wilson was not

detained, not even momentarily. He was advised of the narcotics investigation and information respecting his carrying a lot of drugs. Mr. Wilson consented to search for narcotics. It is submitted that there was no detention.

"If there is no detention - no seizure within the meaning of the Fourth Amendment - then no constitutional rights have been infringed." (Florida v. Royer, supra, 75 L.Ed.2d at 236.)

No detention occurred in the case at bar. It was stated by the California Supreme Court that "... Detective Kaiser did not detain Wilson, for federal constitutional

purposes, merely by approaching him, identifying himself as a police officer, and asking if he might have a minute of his time". (Wilson v. Superior Court, supra at 790; see also Dunaway v. New York, supra, 442 U.S. 200, 210, note 12; Terry v. Ohio, supra, 392 U.S. 1, 31, 32-33, 34; United States v. Mendenhall, supra at 555.) Royer v. Florida, supra, suggests that something more than merely approaching an individual, asking for a minute of his time and identifying oneself as a police officer converts an encounter, which is without constitutional constraint, into a seizure requiring some level of objective justification (Florida v. Royer, supra, 103 S.Ct.

at 1324, 1326). This Court has held that a police officer can properly seek consent to search and need not inform the individual of a right to refuse that consent (Schneckloth v. Bustamonte (1973) 412 U.S. 218, 231; 93 S.Ct. 2041, 2049-2050, 36 L.Ed.2d 854). In light of these authorities, it is submitted that a police officer can identify himself as a narcotics officer and ask for consent to search an individual who has agreed to a temporary encounter with the police officer, even though the clear implication of the request for consent is that the officer is searching for narcotics. The California Supreme Court, however, concluded that where the police

officer expressly stated that he sought consent to search because he had information that the person whose consent he sought had narcotics, the encounter became a seizure within the meaning of the Fourth Amendment.[2] We submit this is a distinction without a difference and that the Constitution does not prohibit a police officer from expressly stating that which is implied by the fact

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2 ". . . Once the officer advised Wilson that he had information that Wilson was carrying a lot of drugs, the entire complexion of the encounter changed and Wilson could not help but understand that at that point he was the focus of the officer's particularized suspicion. Under these circumstances - and particularly in the absence of any clarifying advice from the officer explaining to Wilson that he was, in fact, free to drive away if he desired - no reasonable person would have believed that he was free to leave." (34 Cal.3d at 791.)

that he is a narcotics officer seeking consent to search.

A distinction must be drawn between an encounter and a seizure. This Court has consistently stated that "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a seizure has occurred" (Terry v. Ohio, supra, 392 U.S. at 19, note 16; see also id. at 34 (White J. concurring); id., at 31, 32-33 (Harlan J. concurring). It is submitted that when a narcotics officer identifies himself as such and requests consent to search no "show of authority" occurs which restrains an individual so as to

conclude that a seizure, rather than an encounter, has occurred. No physical force or show of authority occurred in the case at bar so as to restrain petitioner when Officer Kaiser identified himself as a police officer and informed petitioner of the reason for the encounter. It is submitted that the encounter in the case at bar is not a seizure and therefore the evidence obtained incident thereto is admissible.

CONCLUSION

For the reasons set forth in this Petition Petitioner respectfully requests that a Writ of

Certiorari issue to the Supreme Court of California to review that Court's decision to suppress narcotics seized from respondent at the Los Angeles International Airport.

Respectfully submitted,

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for Petitioner

DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, Roderick W. Leonard, Deputy District Attorney, is a member of the bar of this Court. On January 21, 1984, I placed in the United States mail, via U. S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief and appendices thereto accompanied by an entry of appearance addressed as follows:

Office of the Clerk
United States Supreme Court
Number 1 First Street, N. E.
Washington DC 20543

The instant Petition for Writ of Certiorari and appendices were thus mailed on January 21, 1984 which is within the permitted time.

_____

RODERICK W. LEONARD

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Officer of the District Attorney of Los Angeles County, and a member of the bar of this Court, with principal offices located at 849 South Broadway, Los Angeles, California 90014-3570; that the District Attorney is the Petitioner in the above-entitled matter. On January 21, 1984, I served three copies of the foregoing

on the following persons and Court by depositing true copies thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

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EXHIBIT A

[L.A. No. 31668, Oct. 20, 1983.]

CLEROW WILSON, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

OPINION

KAUS, J. - In this writ proceeding, Clerow (Flip) Wilson seeks review of a trial court ruling which denied his motion to suppress evidence obtained as a result of police activity at the Los Angeles International Airport. (Penal Code, § 1538.5, subd. (i).) Wilson contends that the police conduct in question violated the search and seizure provisions of both the federal and state Constitutions and that the evidence should therefore be excluded from his

impending trial. In response, the People maintain (1) that the police actions was proper under both federal and state standards and (2) that even if the conduct violated state search and seizure principles, the evidence may not be excluded on that basis in light of article I, section 28, subdivision (d) of the California Constitution, the so-called "Truth-in-Evidence" provision enacted as part of an initiative measure - Proposition 8 - adopted at the June 1982 election.

As explained, we conclude that the evidence at issue was obtained in violation of the federal Constitution and must be suppressed on that basis. Accordingly, we need

not reach the other issues raised by the parties.

I

At the hearing on the motion to suppress, the arresting officer, Detective Roi Kaiser and Wilson each testified to the events leading up to the discovery of the challenged evidence. Although the two agreed on a number of general facts surrounding the discovery, their testimony conflicted sharply with respect to many important details. Since the trial court resolved this matter in favor of the prosecution, for purposes of this proceeding we view the record in the light most favorable to the People's position. In the interest of completeness, however, we note the

main points of conflict shown by the record.

At the time of the events in question - March 10, 1981 - Detective Kaiser, a Los Angeles police officer, had been working as an undercover narcotics agent at the Los Angeles International Airport for four and a half years, monitoring inbound flights from Florida in an attempt to discover persons transporting narcotics into California. Kaiser testified that about 11:30 a.m. on that day, he and his partner, Deputy Gary Frederick - who was also in plain clothes - went to the Pan American Airlines arrival area to monitor the arrival of a flight from Miami. As the passengers left the plane and entered the

terminal, Kaiser saw Wilson with another man, later identified as Wilson's nephew, Rashon. Kaiser testified that he was not expecting to see Wilson arrive on that flight, but that he recognized him from his television appearances. Wilson was carrying an attache case and Rashon was carrying a box bearing the name "Flip Wilson." Kaiser testified that he noticed nothing unusual about these items.

As Kaiser watched, both Wilson and Rashon looked around the waiting area. Kaiser stated that at this time he observed nothing unusual about Wilson, but that Rashon made "eye contact" with him on two occasions, an occurrence which was consistent with the behavior of

persons he had arrested in the past for transporting narcotics. Although acknowledging that

[34 Cal.3d 781]

Rashon could have simply been looking for someone who was meeting the plane, Kaiser testified that it did not appear that way to him. He conceded, however, that he could not articulate any objective basis for differentiating the "eye contact" of drug couriers from that of other persons.

As Wilson and Rashon walked at a normal pace from the arrival area down a concourse to the street, Kaiser followed about 10 feet behind. Midway down the 200-foot concourse, Rashon turned his head back in Kaiser's general direction and

immediately turned back to speak to Wilson, who then also turned his head back in the general direction of Kaiser. Neither man made eye contact with Kaiser at this time.

At the end of the concourse, Wilson and Rashon were met by Wilson's wife and all three walked outside to Wilson's car which was parked at the curb. Rashon handed the box he was carrying to Wilson, who put it and the attache case in the rear seat of the passenger compartment. Rashon then went to the baggage claim area to retrieve their luggage.

A few minutes later, as Rashon left the baggage claim area with two pieces of luggage, Kaiser and Frederick approached him.

Frederick identified himself as a police officer and had a brief conversation with Rashon which Kaiser apparently did not overhear.

Kaiser then approached Wilson, who - according to Kaiser - was then standing at the open trunk of the car.[1] Kaiser testified that at that point he "had a slight suspicion" that Wilson "possibly" was involved in criminal activity, and that his purpose in speaking to Wilson was to request permission to search his luggage. Kaiser stated that as he reached Wilson, he displayed his police identification, told him that he was a police officer

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1 Wilson testified that when Kaiser first approached him, he was seated in the driver's seat of the car and Kaiser leaned in through an open rear door.

and asked if he "might have a minute of his time." When Wilson responded, "Sure," Kaiser testified that "I advised Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs." (Italics added.)[2]

On cross-examination, Kaiser disclosed that he had obtained the information to which he referred from his partner, Frederick, who, in turn, had learned of it from another person. On defense counsel's motion, the court ruled that if the People

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[2] According to Wilson, Kaiser "stated that he had received a call from a young black man saying that I would be arriving, and that I would be carrying a large quantity of narcotics."

intended to rely on such information to justify the

[34 Cal.3d 782]

officer's actions, Frederick would be required to testify as to the nature and source of the information. (See, e.g., People v. Madden (1970) 2 Cal.3d 1017, 1021 [88 Cal.Rptr. 171, 471 P.2d 971]; Remers v. Superior Court (1970) 2 Cal.3d 659, 666-667 [87 Cal.Rptr. 202, 470 P.2d 11]; People v. Harvey (1958) 156 Cal.App.2d 516, 523-524 [319 P.2d 689] (conc. opn. of Dooling, J. and Draper, J.).) When the People indicated that they did not intend to call Frederick as a witness, the court held that the prosecution could not rely on such information to support the validity of the police

conduct. The People have not challenged that ruling in this proceeding.[3]

After having told Wilson that he had information that Wilson was carrying "a lot of drugs," Kaiser asked if he could search the two pieces of luggage that Rashon had just set on the curb and the box

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[3] A question was raised at oral argument as to whether the trial court's ruling on the so-called Harvey/Madden issue was consistent with federal, as well as state, law. The parties have not provided any relevant authorities on the question, and inasmuch as the People did not raise any objection to the ruling either at the suppression hearing or in any of their papers filed in this proceeding, we have no occasion to address this academically intriguing question in this case. (Cf. People v. Rogers (1978) 21 Cal.3d 542, 547-548 [146 Cal.Rptr. 732 579 P.2d 1048] (defendant may not raise Harvey/Madden issue on appeal where point not properly preserved).)

which had been placed inside the car. Wilson allegedly responded, "Sure, I don't have any drugs that I know of. Go ahead and search."[4] When Kaiser went to the rear passenger seat, he saw the attache case and asked Wilson for permission to search it. Kaiser testified that Wilson then said: "There should only be some papers in there, but you can go ahead and look, if you'd like."[5]

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[4] Wilson testified that when he was first approached by Kaiser, the officer informed him that he had a search warrant for his luggage. Wilson stated that because he had an important engagement and was very pressed for time, he told his nephew to cooperate with the search of the luggage.

[5] Wilson testified that when Kaiser requested permission to search the attache case, the following colloquy occurred: "I said,'I would prefer that you didn't.' [¶] And he said, 'Are you telling me that I cannot search the attache case?' [¶]

Wilson then placed the case on the rear seat and opened it. Kaiser searched through the case and retrieved a glass vial from a pocket on the inside of the lid of the case. At that point, Wilson allegedly stated: "That's just a little bit of has oil in there."

After examining the bottle and concluding that it did contain

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I said, 'I would prefer that you didn't.' [¶] He said, 'Are you refusing to allow me to search the attache case?' [¶] And I said, 'Sir, I am telling you that I would prefer that you didn't.' [¶] And he said, 'I am not concerned if you're carrying just a small stash for your personal use. I'm only concerned with a large quantity.' [¶] And he said, 'I've been to Hollywood parties where they had cocaine on the tables by bowls, and I did not make arrests.' ... So then I - ... I said, 'Since you put it on those terms, okay.' [¶] So I turned around in the seat, and I leaned over the back of the driver's seat, and I opened the attache case and I raised the lid."

has oil, Kaiser asked Wilson "if he would mind accompany me back to the nar-

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cotics office situated at the airport ...." Kaiser testified that at that point Wilson was actually under arrest, although Kaiser had not so informed him. Wilson asked if they could drive to the office in his car so he could remove it from the street, and Kaiser agreed. At the office, Kaiser continued his search of the luggage and found another small glass vial, containing a substance resembling cocaine, inside an eyeglass case in another pocket of the attache case. Wilson was then formally placed under arrest and taken into custody.

At the conclusion of the suppression hearing, defense counsel argued that Wilson's testimony indicated that he had not voluntarily consented to the search as Kaiser claimed, but that even if Kaiser's version of the events was accepted in full, the evidence should still be suppressed because Kaiser's testimony itself established that Wilson had been detained without adequate justification when the claimed consent was given. Defense counsel relied on both federal and state authorities to support his illegal detention claim, though he emphasized the more recent state precedents. In denying the motion, the trial court stated: "The court is of the view, that, one, this was not a detention;

that the information - conduct of the officer was sufficient to justify the approach of a citizen on the street in asking to talk to him with the subsequent items that developed. [¶] Now, it may be that the court has the wrong view of the law in respect to that; but my reading of Tony C. [In re Tony C. (1978) 21 Cal.3d 888] and the cases that follow it are such that the court has made the ruling that it has."

In this proceeding, Wilson challenges the trial court ruling on two alternative grounds, maintaining that the court's conclusion is inconsistent with (1) the line of California decisions emanating from this court's opinion in Tony C., and (2) recent decisions of the

United States Supreme Court applying federal Fourth Amendment principles in similar airport-search settings. Since we conclude that Wilson's federal constitutional claim is dispositive, we address only that issue.

II

A.

Wilson concedes that the trial court could find on the basis of Kaiser's testimony that he consented to the search of his attache case, a search which disclosed the vial of hash oil and resulted in his arrest. (1a) He contends, however, that even if Kaiser's testimony is accepted at face value, the evidence presented at the hearing demonstrates, as a matter

of law, that at the time he consented to the search he was under an illegal detention in violation of the Fourth Amendment. Accordingly, he maintains that the evidence

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obtained as a result of that consent must be suppressed as a fruit of an illegal detention. In support of his claim, Wilson relies on two recent decisions of the United States Supreme Court involving similar airport searches and seizures, Reid v. Georgia (1980) 448 U.S. 438 [65 L.Ed.2d 890, 100 S.Ct. 2752] and the court's very recent decision in Florida v. Royer (1983) --- U.S. --- [75 L.Ed.2d 229, 103 S.Ct. 1319]. As we explain, we conclude that Reid and Royer do support Wilson's claim.

In analyzing the federal constitutional issue, Justice White's lead opinion in Royer provides a logical starting point.[6] In that opinion, Justice White reviewed the

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[6] In Royer, four judges -Justices White, Marshall, Powell and Stevens - joined in Justice White's lead opinion, which reversed Royer's conviction on the ground that his consent to search his luggage had been obtained as the result of an illegal seizure which exceeded the bounds of a permissible detention. Justice Brennan filed a separate opinion, concurring in the result but disagreeing with some of the reasoning of the lead opinion. The four other judges dissented, with Justice Rehnquist writing a dissenting opinion joined by Chief Justice Burger and Justice O'Connor, and Justice Blackjmun writing his own separate dissent.

Although the judges were widely split on the application of federal constitutional principles to the facts of Royer, a close reading of the various opinions suggests that the court is in general agreement as to the overall Fourth Amendment framework summarized in Justice White's lead opinion.

general Fourth Amendment framework that governs the kind of warrantless, investigatory activities that are frequently undertaken by law enforcement officers in an airport setting. (--- U.S. at p. --- [75 L.Ed.2d at pp. 233-239, 103 S.Ct. at pp. 1323-1326].) (2) For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police "contacts" or "interactions" with individuals, ranging from the least to the most intrusive. First, there are what Justice White termed "consensual encounters" (id. --- U.S. at p. --- [75 L.Ed.2d at p. 243, 103 S.Ct. at p. 1329]), which are those police-individual interactions which result in no restraint of an

individual's liberty whatsoever - i.e., no "seizure," however minimal - and which may properly be initiated by police officers even if they lack any "objective justification." (Id. --- U.S. at p. --- [75 L.Ed.2d at p. 236, 103 S.Ct. at p. 1324].) Second, there are what are commonly termed "detention," seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police "if there is an articulable suspicion that a person has committed or is about to commit a crime." (Ibid.) Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an

individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime. (Id. --- U.S. at p. --- [75 L.Ed.2d at p. 237, 103 S.Ct. at p. 1325].)

In this case, Wilson makes no claim that at the time he consented to the search of his attache case he was subjected to restraints which exceeded the

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permissible bounds of a detention. (1b) Thus, the principal question before us is simply whether the police conduct which preceded Wilson's consent involved only a "consensual encounter" which the police could undertake without

objective justification, or whether it amounted to a "detention" which would be permissible only if the police had an objective, articulable basis for suspecting Wilson of criminal conduct. In this regard, Wilson contend that the record establishes, as a matter of law, that (1) the prosecution failed to prove the requisite "objective articulable suspicion" to justify a detention, and (2) he was, in fact, "detained." We turn first to the "articulable suspicion" issue.

B.

As we have seen, at the suppression hearing Detective Kaiser described in considerable detail his observations of Wilson and Rashon which preceded his direct contact

with Wilson. Of the facts related by Kaiser, the only two circumstances that might even plausibly be proffered as a basis of an "articulable suspicion" are (1) Rashon's "eye contact" with Kaiser upon first entering the arrival area of the terminal, and (2) the act that both Rashon and Wilson looked back in Kaiser's general direction as they walked down the concourse toward the airport terminal exit. Wilson contends that these circumstances, singly or in combination, do not rise to the level of an "objective, articulable suspicion" so as to justify even a limited detention under Fourth Amendment principles.

The United States Supreme Court's decision in Reid v. Georgia,

supra, while arising out of different facts, directly supports Wilson's claim. In Reid, an undercover narcotics agent at the Atlanta airport observed the defendant as he arrived on an early morning flight form Fort Lauderdale. As the passengers left the plane and walked down the airport concourse single file, the agent saw the defendant occasionally look back at a second passenger who was separated from him by several other passengers. When the passengers reached the main lobby of the terminal, the second man caught up with the defendant, the two talked briefly, and they then left the terminal together.

The agent approached the two men outside the building,

identified himself as a narcotics agent and asked to see their airline stubs and identification. The men complied with the request. The tickets revealed that they had both been bought with defendant's credit card and that the two men had been in Fort Lauderdale for only one day. At this point, the men appeared nervous and the agent asked if they would agree to return to the terminal and consent to a search of their persons and their bags. The agent testified that the two agreed, but as they returned inside the building, the defendant ran, dis-

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carding his bag. He was quickly apprehended and the bag turned out to contain cocaine.

On these facts, the Georgia Court of Appeal, relying on the agent's testimony that the defendant appeared to fit the airport's "drug courier profile" in a number of respects, held that the officer had "reasonable suspicion" to approach and detain the two men outside the terminal building. Specifically, the Georgia court found it relevant that "(1) the [defendant] had arrived from Fort Lauderdale, which the agent testified is the principal place of origin of cocaine sold elsewhere in the country, (2) the [defendant] arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were

traveling together, and (4) they apparently had no luggage other than their shoulder bags." (448 U.S. at p. 441 [65 L.Ed.2d at p. 894].)

In Reid, the United States Supreme Court reversed the Georgia decision, concluding "that the agent could not, as matter of law, have reasonably suspected the [defendant] of criminal activity on the basis of these observed circumstances." (Ibid.) The court reasoned: "Of the evidence relied on, only the fact that the [defendant] preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances described a very large category or presumably innocent

travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the [defendant] and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot [citation], this is not such a case. The agent's belief that the [defendant] and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and

unparticularized suspicion or "hunch"' [citation], than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case." (Ibid.)

This reasoning applies equally to the present case. Indeed, the facts before us appear, if anything, even less supicious than those in Reid. Aside from the brief "eye contact" with Rashon - a reed at least as "slender" as the agent's suspicion in Reid - the officer did not identify any circumstance which would provide a reasonable basis for distinguishing Wilson from the great bulk of passengers arriving at the Los Angeles International Airport. Thus, on this record, we conclude as

a matter of law that the police did not have an objective, articulable basis to justify a detention of Wilson. Ac-

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cordingly, the determinative issue is whether at the time of his consent Wilson was "detained" for Fourth Amendment purpose or whether he was simply engaged in a consensual encounter."

C.

Reid does not provide an answer to the detention issue. Although holding that the circumstances known to the officer before he approached the two suspects did not rise to the level of "articulable suspicion," the Reid court did not directly address the

issue of whether the officer's conduct amounted to a "detention" of the suspects or, if it did, at what point the detention had begun: because the lower courts had concluded that there was reasonable suspicion to justify a detention, they had not found it necessary to decide whether or not the defendant had been detained; the Supreme Court - while reversing on the reasonable suspicion point - did not reach the detention question, leaving the initial resolution of that matter to the state courts on remand. (See Reid, supra, 448 U.S. at p. 443 [65 L.Ed.2d at p. 895] (conc. opn. of Powell, J.).)[7]

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[7] Similarly, in United States v. Mendenhall (1980) 446 U.S. 544 [64 L.Ed.2d 497, 100 S.Ct. 1870] - an

While Reid thus does not assist us in distinguishing "consensual encounters" from "detentions," the Supreme Court's recent decision in Royer does afford

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airport search case decided just two weeks before Reid - the detention issue had not been litigated in the lower courts, apparently because the prosecution had never contended that the officer's conduct fell short of a detention. Therefore, seven judges of the Supreme Court resolved the case on the assumption that a detention had occurred. Of the seven, three - Justices Powell, Blackmun and the Chief Justice -found that there was sufficient articulable suspicion to justify a detention, and four - Justices White, Brennan, Marshall and Stevens - found that there was not. The two remaining judges - Justice Stewart and Rehnquist - concluded that the detention issue was not foreclosed despite the prosecution's failure to pursue it, and - without deciding the reasonable suspicion question - resolved the case in favor of the prosecution on the ground that no detention had occurred. As a result, the conviction in Mendenhall was affirmed by a five-to-four margin.

considerable guidance on this point. In Royer, two undercover narcotic agents working at the Miami airport testified that they first took note of Royer because they believed that his "appearance, mannerisms, luggage and actions fit the so-called 'drug courier profile.'" (--- U.S. at p. --- [75 L.Ed.2d at p. 233, 103 S.Ct. at p. 1322].) As they observed him, Royer purchased a one-way ticket to New York and checked his two suitcases, placing on each an identification tag with the name "Holt." As he walked along the concourse toward the airline boarding area, the two officers approached him, identified themselves as policemen working out of the sheriff's office, and asked him if he

had a "moment" to speak with them. He said, "Yes."

At the officers' request, Royer produced his airline ticket and driver's license: the ticket - like the baggage identification tags - was made out in

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the name "Holt," while the driver's license carried his correct name, "Royer." When the officer asked about discrepancy, Royer stated that friend had made the reservation in the name "Holt." During this conversation, Royer became noticeably more nervous, and the officers then informed him "that they were in fact narcotics investigators and they had reason to suspect him of transporting narcotics." (Ibid.) At that point

the officers, who still had Royer's airline ticket and identification, asked him to accompany them to a room adjacent to the concourse, about 40 feet away.

Without saying anything, Royer walked with the officer to the small room - described as a "large storage closet" - which contained a desk and two chairs. Without seeking Royer's consent, one of the officers retrieved the luggage which Royer had checked and brought it to the room. Royer then was asked if he would consent to a search of the suitcases. In response, Royer produced a key and unlocked one suitcase; an officer opened it and found a substantial quantity of marijuana. Royer then consented to the search of the second

bag, in which, too, marijuana was found. The entire episode - from the time the officers first approached Royer to their discovery of the contraband - took about 15 minutes.

Before trial, Royer moved to suppress the evidence on Fourth Amendment grounds, the motion was denied and he was convicted of felony marijuana possession. On appeal, the Florida Court of Appeal reversed the conviction, holding (1) that the police did not even have sufficient information to constitute the articulable suspicion required to justify a limited detention and (2) that, in any event, the police conduct which preceded the consent exceeded the limited restraint permitted in a detention context.

The state then appealed that decision to the United States Supreme Court.

In its decision in Royer, the high court disagreed with the Florida court on the "articulable suspicion" issue[8] but upheld the reversal of the convction on the ground that the police had indeed exceeded the bounds of a limited

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[8] In holding that there were articulable grounds for suspicion, the lead opinion in Royer stated: "We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers - paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general - were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention." (--- U.S. at p. --- [75 L.Ed.2d at p. 239, 103 S.Ct. at p. 1326].)

detention - that, before he had consented to the search of his luggage, "[a]s a practical matter, Royer was under arrest." (--- U.S. at p. --- [75 L.Ed.2d at p. 240, 103 S.Ct. at p. 1327].) Although the ultimate holding in Royer thus turned on an issue - the line between a "detention" and an "arrest" - which is not involved in this case, the lead opinion in Royer

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contains several passages which shed considerable light on the question which is at issue here - namely, the distinction between a "consensual encounter" and a "detention."[9]

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9 Although only four justices signed Justice White's lead opinion in Royer, Justice Blackmun though dissenting on another issue, expressly signaled his general

First, in summarizing general Fourth Amendment principles, the lead opinion describes some of the more typical police actions that fall into the "consensual encounter" category. The opinion observes: "[L]aw enforcement officers do not violate the Fourth Amendment by merly approaching an individual on the street or in another public place, by

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agreement with the lead opinion's analysis of the "consensual encounter"/"detention" issue. (--- U.S. at pp. --- - --- [75 L.Ed.2d at p. 246-247, 103 S.Ct. at pp. 1332-1333].) Moreover, in his concurring opinion, Justice Brennan indicated that he would take a narrower view of those police activities that constituted consensual encounters than that expressed in the lead opinion. (Id. --- U.S. at pp. --- - --- [75 L.Ed.2d at pp. 244-245, 103 S.Ct. at pp. 1330-1331].) Thus, it is evident that the lead opinion's views as to the limits on consensual encounters clearly enjoy majority support within the court.

asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answer to such questions. [Citations.] Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. [Citation.] The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. [Citations.] He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen

or answer does not, without more, furnish those grounds. [Citation.] if there is no detention - no seizure within the meaning of the Fourth Amendment - then no constitutional rights have been infringed." (--- U.S. at p. --- [75 L.Ed.2d at p. 236, 103 S.Ct. at p. 1324].)

Though this passage gives some indication of the attributes of a consensual encounter, it does not in itself set forth a clear constitutional standard for distinguishing such an encounter from a detention. That additional guidance is provided in a subsequent passage, where the lead opinion, in rejecting the state's contention that the "entire encounter was consensual," states: "Asking for and

examining Royer's ticket were no doubt permissible in themselves, but when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purpose of the Fourth Amendment. These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'

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United States v. Mendenhall, 446 U.S. 544, 554 (Opinion of Stewart,

J.)." (Italics added.) (--- U.S. at p. --- [75 L.Ed.2d at p. 239, 103 S.Ct. at p. 1326].)

(3) In light of the emphasized language and the citation of Mendenhall, it is now clear that a substantial majority - and perhaps all - of the Supreme Court justices agree with the standard set forth by Justice Stewart in his separate opinion in that case: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[10]

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[10] Six members of the present court have either authored or joined in opinions explicitly endorsing the Mendenhall standard. Justices White, Marshall, Powell and Stevens signed

(United States v. Mendenhall, supra, 446 U.S. at p. 554 [64 L.Ed.2d at p. 509].) (1c) Thus, the question before us is whether, at the time Wilson consented to the search of his attache case, a reasonable person in Wilson's position would have believed

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the lead opinion in Royer; Justice Blackmun expressly approved that standard in his dissent in Royer (--- U.S. at p. --- [75 L.Ed.2d at p. 246, 103 S.Ct. at p. 1332]); and Justice Rehnquist joined in the relevant portion of Justice Stewart's opinion in Mendenhall itself. Of the three remaining justices, Chief Justice Burger joined Justice Powell's concurring opinion in Reid, which - at the least - strongly hinted at its approval of the Mendenhall test (448 U.S. at p. 443 [65 L.Ed.2d at p. 895]), and Justice Brennan appears to have applied the Mendenhall standard in his discussion of the detention issue in his concurring opinion in Royer. (--- U.S. at p. --- [75 L.Ed.2d at p. 245, 103 S.Ct. at p. 1331].) Only Justice O'Connor, who was not on the court when Mendenhall and Reid were decided, has not indicated her views on the issue.

that he was not free to leave.

Reviewing the facts of this case in light of this standard and the relevant portions of Royer, it is evident that Detective Kaiser did not detain Wilson, for federal constitutional purposes, merely by approaching him, identifying himself as a police officer, and asking if he might have a minute of his time. At that point, however, the officer did not simply ask Wilson if he would permit a search of his luggage. Instead, he advised Wilson that he was conducting a narcotics investigation and that he "had received information that he [Wilson] would be arriving today from Florida carrying a lot of drugs." (Italics added.)

Common sense suggest to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away fron the officer. Before Kaiser made that statement, Wilson might well have thought that the officer was simply pursuing routine, general investigatory activities, and might reasonably have felt free to explain to the officer that he had an important appointment to keep and did not have the time - or, perhaps, the inclination - to answer the officer's ques-

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tions or to comply with his request

for permission to search. Once the officer advised Wilson that he had information that Wilson was carrying a lot of drugs, the entire complexion of the encounter changed and Wilson could not help but understand that at that point he was the focus of the officer's particularized suspicion. Under these circumstances - and particularly in the absence of any clarifying advice from the officer explaining to Wilson that he was, in fact, free to drive away if he desired - no reasonable person would have believed that he was free to leave. (See United States v. Berry (5th Cir. 1982) 670 F.2d 583, 597; United States v. Robinson (5th Cir.

1980) 625 F.2d 1211, 1216-1217.) [11]

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[11] One commentator - in a thoughtful article on the general "seizure" question - has made this same point: "The nature of the questions asked by the officer during an encounter also may be relevant to the seizure issue. As questioning moves from general questioning concerning facts unrelated to a particular crime or class of crimes to questions indicating the officer's interest in a specific crime or class of crimes, the perception of the citizen reasonably may change from one of a voluntary encounter, from which he is free to disengage, to one of a formal police investigation of specific criminal activity, which he is not free to ignore. . . . In the absence of actual physical restraints or unequivocal verbal commands, a reasonable person examining the conduct of the officer is more likely to view the circumstances as a seizure when the conduct or verbal activities of the police become more intrusive, that is, when they clearly are related to the investigation of specific criminal acts. It is the threat of arrest and prosecution that produced the perception of restricted liberty in a police-citizen encounter, and that perception is more likely to arise when conduct of the police is linked to the investigation of specific criminal activity." (Williamson, The

Accordingly, we conclude that Wilson was detained, within the meaning of the Fourth Amendment, when he consented to the search of his attache case. Of course, if - as Detective Kaiser represented - the police did in fact have additional information indicating that Wilson would be transporting narcotics, that information might well have provided a reasonable basis for the detention, in which case Wilson's consent would have been validly obtained. As we have explained, however, the prosecution - despite fair warning - failed to present the relevant testimony to substantiate the alleged information. On this record, we can

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Dimensions of Seizure: The Concepts of "Stop" and "Arrest" (1982) 43 Ohio St.L.J. 771, 795, 802.)

only conclude that the police detained Wilson in violation of the Fourth Amendment, and that the trial court erred in failing to suppress the evidence obtained as a result of that illegal detention.[12]

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12 Although the People have not expressly conceded the point, they have not argued that the evidence should not be suppressed even if Wilson was illegally detained, on the theory that the evidence was not the "product" of the illegal detention. Since Wilson's consent followed within minutes of the detention, and since there were no intervening circumstances whatsoever, such a claim would, in any event, be untenable. (See Royer, supra, --- U.S. at p. --- [75 L.Ed.2d at p. 239, 103 S.Ct. at p. 1326]; Dunaway v. New York (1979) 442 U.S. 200, 216-218 [60 L.Ed.2d 824, 838-839, 99 S.Ct. 2248]; Brown v. Illinois (1975) 422 U.S. 590, 601-605 [45 L.Ed.2d 416, 425-428, 95 S.Ct. 2254].)

Let a peremptory writ of mandate issue, directing the trial court to vacate its order denying the motion to suppress and to enter a new order granting the motion.

Bird, C. J., Mosk, J., Richardson, J., Broussard, J., Reynoso, J., and Grodin, J., concurred.

EXHIBIT B

[Civ. No. 64102. Second Dist., Div. One. July 23, 1982.]

CLEROW WILSON, Petitioner, v.
THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;
THE PEOPLE, Real Party in Interest.

OPINION

HANSON (Taxton), J.--

Introduction

Petitioner/defendant Clerow Wilson aka Flip Wilson (hereinafter defendant and/or Wilson) seeks a peremptory writ mandating respondent court to vacate its ruling denying his motion pursuant to Penal Code section 1538.5 (hereinafter section 1538.5) to exclude as evidence contraband (hashish oil and cocaine) found in his attache case at the Los Angeles International Airport after he deplaned from a flight from Miami, Florida.

The determinative issue of this case

is whether or not defendant Wilson was improperly initially subjected to a "detention" at the airport in violation of his "Fourth Amendment" rights as referred to in the federal Constitution and the parallel provision in California's Constitution guaranteeing against unreasonable "seizures."

Superimposed on the determinative issue, and of no little significance, is our duty to determine the effect on this case, if any, of the passage on June 8, 1982, of Proposition 8 entitled "Criminal Justice--Initiative Statutes and Constitutional Amendment" now enacted in article I, section 28, of the California Constitution commonly referred to as the "Victims' Bill of Rights," (hereinafter Proposition 8) and specifically section 28, subdivision (d), of the initiative entitled "Right to Truth-in-Evidence" (hereinafter

Truth-in-Evidence provision). Proposition 8 became effective on June 9, 1982, while the instant case was pending before this court.

Procedural History

On April 30, 1981, defendant Wilson was charged in a two-count information with possession of cocaine in violation of Health and Safety Code section 11350, a felony (count I) and possession of hashish oil (concentrated cannabis) in violation of Health and Safety Code section 11357, subdivision (a), a felony (count II).

On May 13, 1981, the defendant pled not guilty and made a motion pursuant to section 1538.5 to exclude as evidence the narcotics found in his possession.

On October 16, 29 and 30, 1981, defendant's motion to suppress the evidence was heard and denied.

On November 30, 1981, defendant

filed with this court a "Petition For Writ of Prohibition (Stay) and Writ of Mandate" seeking to have the superior court's ruling on this motion annulled and vacated.

On January 22, 1982, this court summarily denied the petition (per Lillie, Acting P. J., and Hanson, J.; with Dalsimer, J., voting to grant the petition).

On February 1, 1982, defendant Wilson filed a "Petition in the Alternative for Writ of Mandate and/or Writ of Prohibition" with the California State Supreme Court essentially containing the same supporting documentation previously supplied this Court of Appeal.

On February 18, 1982, the state Supreme Court made the following order: "Petition for hearing GRANTED. The matter is transferred to this court and retransferred to the Court of Appeal, Second District, Division One, with

directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar. (See People v. Bower, 24 Cal.3d 638, 643, and In re Tony C., 21 Cal.3d 888, 895-896.)"

On March 26, 1982, this court in compliance with the above order issued an "Alternative Writ of Mandate," and the matter was heard on May 25, 1982, and submitted.

On June 8, 1982, before our decision was rendered, the California electorate passed Proposition 8 containing the "Right to Truth-in-Evidence" provision (§ 28(d)) which became effective on June 9, 1982.

On July 1, 1982, after first vacating the May 25, 1982, submission order and receiving and considering supplementary written briefs from counsel limited to the issue of the effect, if any, of the passage of Proposition 8 upon issues relevant to this case, this court heard

additional oral argument and resubmitted the matter. Amicus curiae briefs were invited, received and considered from the offices of both the state Attorney General and the State Public Defender, and representatives from those offices were granted permission, and did, orally argue their respective positions at the hearing.

Facts

(1) We view the evidence in the light most favorable to the order denying suppression as required by the familiar rule governing appellate review. (People v. Leyba (1981) 29 Cal.3d 591 [174 Cal. Rptr. 867, 629 P.2d 961].)

Defendant Wilson's motion to suppress evidence was hotly contested during a three-day hearing in the superior court. (Hon. Edward A. Hinz, judge presiding.)

At the hearing, Officer Roy (Roi) Kaiser of the Police Department of the

City of Los Angeles assigned to the narcotics division testified that he had been a narcotics officer for about ten years engaged exclusively in major drug peddling suppression within the City of Los Angeles, and that for approximately four and one-half years he had been specifically assigned to the Los Angeles International Airport Narcotics Bureau. Officer Kaiser stated that he had participated in excess of a thousand narcotics investigations and made hundreds of arrests of persons involved in violation of the state and federal narcotics laws; that he had lectured extensively across the United States at various drug enforcement agency seminars; and that he had testified as an expert in both state and federal courts across the United States.

Officer Kaiser testified that on March 10, 1981, at approximately 11:30 or 11:45 a.m., while at the Satellite area of Pan American Airlines at the Los Angeles International Airport and dressed in casual street attire, he observed defendant Wilson deplaning carrying an attache case. The defendant was accompanied by another black male person (established as defendant's nephew Rashon Wilson) who was carrying a box that had the name "Flip Wilson" written on it. Officer Kaiser, whose duty was to monitor in a general fashion in-bound Florida flights on a daily basis, did not expect defendant Wilson to get off on that particular airplane but had prior information that he (Wilson) might be arriving on a flight from Florida on that date.

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Officer Kaiser monitored the movement of the defendant and Rashon Wilson and "observed the two of them to be looking about inside the arrival area," and that on at least two specific occasions Rashon Wilson made eye contact with him (Officer Kaiser) in the arrival area. Officer Kaiser testified that in the past such behavior, eye contact and looking about after deplaning these flights, was engaged in by other persons he had arrested for transporting narcotics. (On cross-examination the officer testified that the specific type of eye contact he had with Rashon Wilson was similar to the eye contact he had with others who were drug carriers.)

Officer Kaiser walked behind the defendant and his companion down the escalator into the concourse to the terminal building. About midway in the

concourse, the officer observed Rashon Wilson look to his rear in the officer's general direction, then immediately turn and appear to speak to defendant Wilson who also looked back in the officer's general direction.

Officer Kaiser followed the two to the end of the conclurse where they met defendant's wife, Mrs. Wilson. The three then walked out onto the sidewalk in front of the terminal building where Rashon Wilson handed the defendant the box Rashon Wilson was carrying. Defendant then went to the curb and placed the attache case he was carrying and the box handed to him in the rear passenger section of a vehicle parked at the curb. He and Mrs. Wilson entered the vehicle.

Officer Kaiser observed Rashon Wilson converse with the occupants inside the vehicle and then go to the baggage room of Pan American Airlines. Officer Kaiser followed Rashon Wilson to the baggage

room and saw him get two pieces of luggage off the rack, exit the baggage room and walk in the direction of the vehicle at the curb. At the same time Officer Kaiser saw his partner, Officer Gary Frederick of the Los Angeles Sheriff's Department, approach Rashon Wilson and have a conversation with him. Officer Kaiser did not enter into this conversation. The three then walked back to the vehicle parked at the curb.

When Officer Kaiser arrived back at the vehicle, he observed defendant Wilson standing at the rear of the vehicle by the open trunk. Officer Kaiser told the defendant he was a police officer and produced police identification. The officer then asked defendant Wilson if he "might have a minute of his time" to which the defendant replied, "Sure." The officer then advised the defendant that

he was conducting a narcotics investigation and that information had been received that he (defendant Wilson) would be arriving from Florida carrying a lot of drugs and asked if he (Officer Kaiser) could search the luggage at the curb and the box inside the vehicle. Defendant Wilson said "Sure. I don't have any drugs that I know of. Go ahead and search."

As Officer Kaiser was about to remove the box from inside the rear passenger section of the vehicle, he again noticed the attache case and asked defendant Wilson if he could also search the attache case. Defendant Wilson replied: "There should only be some papers in there. But you can go ahead and look if you like."

Defendant Wilson placed the attache case on the rear seat of the vehicle and opened it himself in the officer's view.

Officer Kaiser searched the attaché case and found a glass vial of oil in a pocket in the lid of the case containing a "dark tarry-type substance" which appeared to be hashish oil. Upon observing this, defendant Wilson said "That's just a little bit of hash oil in there."

Officer Kaiser then asked the defendant if "he would mind accompanying [him] back to [his] narcotics office situated there at the airport" and defendant stated "he would." The defendant asked if they could all go in his car and the officer agreed. The defendant drove his car to the airport narcotics office accompanied by his two companions and the two narcotics officers. At the office a continued search of the attaché case disclosed an eyeglass case containing a glass vial resembling cocaine.[1]

(Footnote continued on next page.)

(Footnote continued from previous page.)

1. The reporter's transcript of the hearing on defendant's motion to suppress as evidence the hashish oil and cocaine found in the defendant's attaché case contained the following colloquy on direct examination of Officer Kaiser by the prosecuting attorney, Mr. Jenkins:

"Q. (Mr. Jenkins) What happened next?

"A. Upon arriving at the vehicle, the defendant Mr. Wilson was standing at the rear of the vehicle by an open trunk of the vehicle.

"Q. What happened next?

"A. I approached Mr. Wilson, and I displayed my police identification to him. I told him I was a police officer; and I asked him if I might have a minute of his time.

"Q. What did he say?

"A. He stated 'Sure.'

"Q. What happened next?

"A. At this time, I advised Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs. And I asked Mr. Wilson if he--

"MR. MOORE: Objection to the use of the term 'we.' Move to strike.

"THE COURT: Well, that part may be stricken. . . .

"Q. BY MR. JENKINS: What happened after you advised Mr. Wilson that you had information he was carrying a large quantity of drugs?

"A. I asked Mr. Wilson if I could search his luggage that was there at the curb, and also the box that I had observed him place inside the vehicle. (Continued)

(Continued from previous page.)
"Q. What did he answer?
"A. He stated, 'Sure.' And he said, 'I don't have any drugs that I know of. Go ahead and search'.
"Q. What happened next?
"A. At this time, I walked with Mr. Wilson to the--around the vehicle. Mr. Wilson went to the one side of the vehicle; and I went to the other. And, as he was about to remove the box from inside the rear passenger section of the vehicle, I noted again the attaché case and at this point, I asked Mr. Wilson if I could also search the attaché case.
"Q. And did he answer that question?
"A. Yes, he did.
"Q. What did he say?
"A. He stated, 'There should only be some papers in there. But you can go ahead and look if you'd like.'
"Q. What happened next?
"A. At this time, he placed the attaché case on the rear seat of the vehicle. He opened the attaché case, presenting what was in there, in my view. I conducted a search of the attaché case.
"Q. Tell us what you did.
"A. I withdraw [sic] from the lid portion, a pocket area of the attaché case, a glass vial; and upon holding it in my hand--
"Q. Did Mr. Wilson say anything at that time?
"A. Yes, he did.
"Q. What did he say?
"A. He stated, 'That's just a little bit of hash oil in there.'
"Q. Did you investigate that particular glass bottle further?
(To be continued.)

(Continued)

"A. I did.

"Q. What did you do?

"A. I opened the glass vial by removing the lid cap. I looked at the substance inside, which appeared to be a dark tarry-type substance. I also smelled at the substance, and in my opinion it appeared to be that of hash oil.

"Q. What happened at that point?

"A. At this point, I asked Mr. Wilson if he would mind accompanying me back to my narcotics office situated there at the airport; and he stated he would.

"Q. What happened at that point?

"A. At this point, I asked Mr. Wilson if he would mind accompanying me back to my narcotics office situated there at the airport; and he stated he would.

"Q. What happened next?

"A. At this time Mr. Wilson asked me if it would be all right if we would take his car and ride over there together in his car, so he could get it off the street.

"Q. Did you agree to that?

"A. I did.

"Q. And who got in the car?

"A. I got into the rear portion of the vehicle; my partner also got into the rear portion of the vehicle. Mr. Wilson was driving. The woman was also in the front passenger section of the vehicle. And the other individual, the other male person, was in the back seat, as I recall, with my partner.

"Q. And did you go over to the narcotics office?

"A. We did.

"Q. And when you got there, did you

(To be continued.)

On cross-examination by defense counsel, Officer Kaiser stated that the first time he spoke to the defendant he had a slight suspicion that the defendant was possibly involved in criminal conduct; that his purpose in speaking to the defendant was to request permission to search his luggage; that he did not advise the defendant that he did not have to consent to the search; and that at the time he first approached the defendant he and Rashon Wilson were in close proximity.

(Footnote continued from previous page.)
continue your search of the attache case?
"A. I did.
"Q. Did you find anything else?
"A. Yes, I did.
"Q. What else did you find?
"A. I discovered inside an eyeglass case that was inside the attache case. The eyeglass case contained a glass vial. Inside the glass vial appeared to be a white powdery substance, which, in my opinion, resembled that of cocaine.
"Q. Did you retain both of those items, the hash oil and the apparent cocaine?
"A. I did."

Mrs. Wilson was in the right front seat and Rashon Wilson was on the sidewalk. Officer Kaiser denied that before looking in the attaché case he told the defendant that he was not interested in a small amount of contraband for personal use as he was only looking for a larger quantity.[2]

Following the direct and cross-examination of Officer Kaiser and argument in respect to a detention, the issue was submitted to the court for a ruling and the trial court denied the motion.[3]

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2. Officer Kaiser testified that after he found the vial with hashish oil the defendant was not free to go and was technically under arrest; although, that was not communicated to him. Defendant was told he was under arrest when the other contraband (cocaine) was found while in the airport office.

3. The reporter's transcript of the hearing on the motion to suppress the evidence shows that at this point of the proceedings the court, after Officer Kaiser testified but before defendant Wilson took the stand, stated:

"The motion to dismiss--and to suppress the evidence is denied at this

(Continued)

Subsequent to the above ruling by the court, defendant Wilson took the witness stand and testified in his own behalf.[4]

(Footnote continued.)
point.

"The court is of the view that there is sufficient evidence before the court at this time that indicates that the officer approached the defendant and asked if he could speak--was not physically detaining him; and, based on the testimony I have heard, the defendant was more than willing to discuss the matter with him.

"And a consent search was obtained.

"So, the motion by defense counsel at this point is denied.

"MR. MOORE [Defense Counsel]: Your Honor, with respect--may I just inquire concerning the standard that I argued to the court? The purpose--

"THE COURT: The court finds that the conduct of the officer is consistent with the requirements of the law as laid down probably most recently by the California Supreme Court in the Tony C. case, which I'm thoroughly familiar with.

"MR. MOORE: Thank you."

4. Defendant Wilson on direct examination by his counsel testified substantially as follows: That on March 10, 1981, he arrived on a flight from Miami; that he walked down the concourse with his nephew, Rashon Wilson, and encountered his wife who met them at the front of the airport; that Rashon Wilson was carrying a large box which contained (Continued)

(Footnote continued.)
a Milifiori lamp which defendant had purchased in an antique shop in Florida; that Rashon Wilson was also carrying a Virginia ham and defendant's attaché case; that he gave the claim checks to Rashon Wilson, went to the car, placed the box in the car, put the ham in the trunk, and put the attaché case into the car; that he then saw Officer Kaiser at the right front door of the car and heard Rashon Wilson say that the officer had a search warrant to search his bags; that Officer Kaiser then said he had a search warrant to search the bags and told him that he (Officer Kaiser) had received a call from a young black man saying that defendant Wilson would be arriving and would be carrying a large quantity of narcotics; that he (defendant Wilson) replied that that was absurd, he was a professional entertainer and not a narcotics dealer and told Officer Kaiser that he was pressed for time and had to rush home because he had an appointment to meet Mayor Bradley; that he then instructed Rashon Wilson to cooperate with the police; that the police then proceeded to search his black piece of luggage which was on the ground at the rear right door of the car; that then Officer Kaiser leaned back in and asked if he could search the attaché case and he (defendant Wilson) said that he would prefer he did not; that Officer Kaiser said he was not concerned if he was carrying only a small stash for personal use, and was concerned with a large quantity; the officer said he had been to Hollywood parties where they had cocaine on the table by bowls and he did not make
(Continued)

Neither Mrs. Wilson nor Rashon Wilson, who were present and apparently had knowledge as to what transpired, were

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(Footnote continued from previous page.) arrests; that defendant responded that since the officer put it in those terms, he could search.

Defendant Wilson further stated that he personally leaned over the back seat, opened the attaché case and raised the lid, picked up the bottle of hashish and showed the officer the cocaine; that Officer Kaiser then said he had to place him under arrest; and that they all went over to the police station where the officer searched the box. Defendant further testified that he gave the officers permission to search the attaché case because they had stated they were not concerned whether he was carrying something that was only for his own personal use but were concerned about a large quantity and heard he was carrying a large quantity. Defendant testified that he never asked to see the search warrant nor did the officer represent that he had a search warrant for the attaché case.

On cross-examination by the prosecuting attorney, defendant Wilson said Officer Kaiser told him the search warrant was for the black bag and that he never asked to see the warrant; that at no time did the officer represent to him that he had a search warrant for the attaché case. Defendant admitted that he consented to a search of the attaché case with reservations.

called as witnesses by the defense. Following additional argument by counsel, the court again ruled that Officer Kaiser's conduct did not constitute a detention and denied defendant's motion to suppress under section 1538.5.[5]

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5. The reporter's transcript contains the following statement by the trial court: "THE COURT: All right. [¶] Thank you. [¶] The court being advised in the matter, having heard the testimony of the witnesses, having had the benefit of the moving papers, and having heard the argument of counsel, of course, the testimony which extended over two days--a week ago last Friday and yesterday--the court being advised in our matter, orders that the motion under Penal Code section 1538.5 be denied. [¶] The court is of the view that, one, this was not a detention; that the information--conduct of the officer was sufficient to justify the approach of a citizen on the street and asking to talk to him with the subsequent items that developed. [¶] Now, it may be that the court has the wrong view of the law in regard to that; but my reading of Tony C. and the cases that follow it are such that the court has made the ruling that it has. [¶] The Motion under 1538.5 is denied."

Issues

(2) (See fn. 6.) The determinative issue is not whether Officer Kaiser suspected defendant Wilson of criminal activity, but whether defendant Wilson subjected to a detention in the first instance at his vehicle in front of the Los Angeles International Airport which violated his constitutional guarantees against unreasonable "seizures" within the meaning of the Fourth Amendment to the United States Constitution and its parallel provisions in article I, section 13, of the California Constitution as construed by federal and state decisional law.[6]

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6. The issue as to whether or not defendant Wilson voluntarily consented to the search of his attache case where the cocaine and hashish oil were found as encompassed in the issues raised at the defendant's motion to suppress before the trial court. The record indicates that the trial court favored the credibility of (Continued)

(Footnote continued from previous page.) the testimony of Officer Kaiser over that of defendant Wilson even though the defendant testified that he personally opened his own attaché case with reservations. (See fn. 4, ante.)

The law is well settled on the role of a reviewing court in respect to ruling on a voluntariness of consent issue. "The question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, determined in the first instance by the trier of fact; and in that stage of the process,

'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings --whether express or implied--must be upheld if supported by substantial evidence.' (People v. Superior Court (Keithley) (1975) 13 Cal.3d 406, 410 [118 Cal.Rptr. 617, 530 P.2d 585]; accord, People v. Ruster (1976) 16 Cal.3d 690, 701 [129 Cal.Rptr. 153, 548 P.2d 353].)" (People v. James (1977) 19 Cal.3d 99, 107 [137 Cal.Rptr. 447, 561 P.2d 1135]; see also People v. Denman (1980) 112 Cal.App. 3d 1003, 1010 [169 Cal.Rptr. 742].)

There is ample evidence in the instant case to support the trial court's finding as to the voluntariness of defendant Wilson's consent to search his attaché case. In any event the voluntariness of defendant Wilson's consent to search his attaché case has not been raised or pressed in proceedings before this court.

However, the passage of Proposition 8 by the California electorate on June 8, 1982, which became effective on June 9, 1982, while the case at bench was still pending decision, has presented the important issue of the impact and effect, if any, of Proposition 8 upon the resolution of the detention issue.

Defendant's counsel in his supplementary brief, augmented by the State Public Defender in his amici brief and at oral argument, contends (1) that Proposition 8 is unconstitutional in its entirety because it (a) was voted on within less than 131 days of its qualification for the ballot and was not passed at a "general election" as required by the California Constitution, (b) violates "the Single-subject Rule," and (c) is a constitutional revision and not merely an amendment to the California State Constitution thereby

requiring a constitutional convention; (2) that in the event Proposition 8 is held to be constitutional, section 28, subdivision (d), the Truth-in-Evidence provision can only be applied prospectively in this case, and that if the Truth-in-Evidence provision were to be applied retroactively there would be a denial of equal protection and due process of laws and a violation of the proscription against ex post facto laws.

The district attorney's office and the state Attorney General's office in briefs and at oral argument assert that Proposition 8 is constitutional; that the Truth-in-Evidence provision applies retroactively; that defendant Wilson is not denied equal protection or due process of law; and that the proscription against ex post facto laws is inapplicable.

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Discussion

I

Background

The state Supreme Court in retransferring the instant case back to this court to issue an alternative writ, to conduct a hearing and write an opinion, directed our attention to the California Supreme Court cases of People v. Bower (1979) 24 Cal.3d 638 [156 Cal.Rptr. 856, 597 P.2d 115] and In re Tony C. (1978) 21 Cal.3d 888 [148 Cal.Rptr. 366, 582 P. 2d 957], which involve the exclusion of relevant evidence.

The Truth-in-Evidence provision of Proposition 8 provides, with certain exceptions, that "Relevant Evidence Shall Not Be Excluded in any Criminal Proceeding." We are compelled to address the constitutional issues of Proposition 8

and the retroactivity issue of the Truth-in-Evidence provisions raised by the defendant before considering whether Bower and In re Tony C. are controlling. This is so because those cases, as well as section 1538.5[7] pursuant to which defendant Wilson made his motion to suppress in the superior court, contain California case and code law which sanctions the exclusion of relevant evidence in criminal proceedings thereby colliding with the plain language of the Truth-in-Evidence provision of Proposition 8.

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7. Section 1538.5, subdivision (a)(1), and subdivision (d) provides: "(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds: [¶] (1) The search or seizures without a warrant was unreasonable. . . . [¶] (d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or Section 1238 or Section 1466 are utilized by the people."

II

Proposition 8 Constitutional Issues

A. Was proposition 8 constitutionally eligible for the June primary ballot? Yes.

(3) The defendant first asserts that Proposition 8 was not constitutionally eligible to be placed on the June primary ballot because it violated article II, section 8, subdivision (c) of the California Constitution[8] in that the election was

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8. California Constitution, article II, section 8, subdivision (c) provides: "The Secretary of State shall submit the [initiative] measure at the next general election held at least 131 days after it qualified or at any special statewide election held prior to a general election. The governor may call a special statewide election for the measure." (Italics added.)

The Governor and the Secretary of State issued the following election proclamation: "I, Edmund G. Brown, Jr., Governor of the State of California, pursuant to Section 2553 of the Elections Code, hereby proclaim that the Statewide Direct Primary shall be held on the eighth day of June, 1982, at which time such state, county, judicial or other offices as are provided by law are to be filled at (Continued)

(Footnote continued from previous page.) such election. Also, the following measures proposed by the Legislature, together with four initiative measures and four referendum measures will be submitted to the qualified voters of the State on that date:

"PROPOSITION 1	THE NEW PRISON BOND ACT OF 1981 CHAPTER 273, STATUTES OF 1981.
"PROPOSITION 2	PRESIDENT OF SENATE. LEGISLATIVE CONSTITUTIONAL AMENDMENT.
"PROPOSITION 3	TAXATION. REAL PROPERTY VALUATION. CHANGE IN OWNERSHIP. LEGISLATIVE CONSTITUTIONAL AMENDMENT.
"PROPOSITION 4	BAIL. LEGISLATIVE CONSTITUTIONAL AMENDMENT.
"PROPOSITION 5	GIFT AND INHERITANCE TAXES (PROPONENT MILLER). INITIATIVE STATUTE.
"PROPOSITION 6	GIFT AND INHERITANCE TAXES (PROPONENT ROGERS). INITIATIVE STATUTE.
"PROPOSITION 7	INCOME TAX INDEXING. INITIATIVE STATUTE.
"PROPOSITION 8	*CRIMINAL JUSTICE. INITIATIVE STATUTES AND CONSTITUTIONAL AMENDMENT.* (Italics added.)
"PROPOSITION 9	WATER FACILITIES INCLUDING A PERIPHERAL CANAL. REFERENDUM STATUTE.
"PROPOSITION 10	REAPPORTIONMENT. CONGRESSIONAL DISTRICTS. REFERENDUM STATUTE.
"PROPOSITION 11	REAPPORTIONMENT. SENATE DISTRICTS. REFERENDUM STATUTE
"PROPOSITION 12	REAPPORTIONMENT. ASSEMBLY DISTRICTS. REFERENDUM STATUTE.

"IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 16th day of March, 1982.

"/s/ EDMUND G. BROWN, JR.
"GOVERNOR
"ATTEST:
"/s/ MARCH FONG EU
"Secretary of State

"by /s/ MARJORIE R. HERSBERGER"

not held "at least 131 days after it qualifies," denying the opponents the required time in which to campaign against the initiative which was not voted on at a "general election." The contention is without merit.

On January 22, 1982, in a writ proceeding, Paul Gann et al. v. March Fong Eu, case No. 301007, in the Superior Court in and for the County of Sacramento (Honorable Horace Cecceltini, judge, presiding) Proposition 8 was ordered qualified for the June 8 ballot as of January 22, 1982, 135 days prior to the election.

However, the defendant argues that Proposition 8 was not "cleared"[9] for the

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9. The State Public Defender's Office in its amici brief used the word "qualified" rather than "cleared." The word "cleared" does not appear in California Constitution, article II, section 8, subdivision (c). (See fn. 8, ante.)

ballot until the state Supreme Court decided Brosnahan v. Eu (1982) 31 Cal.3d 1 [181 Cal. Rptr. 100, 641 P.2d 200], on March 11, 1982, citing the dissenting opinion of Chief Justice Bird [at p. 15, fn. 1] which stated that "the constitutionality of submitting an initiative to the voters at a June primary election would appear to be an open question."

We cannot ignore the history of the efforts of the proponents of Proposition 8 to place the initiative on the June 8 primary ballot as summarized by "THE COURT" opinion in Brosnahan (set out haec verba in fn. 10 below).[10] The Brosnahan

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10. Following is the majority opinion in Brosnahan v. Eu, supra, 31 Cal.3d 1: "THE COURT--(1) In this proceeding petitioners seek to prevent respondent Secretary of State from instituting measures preparatory to placing on the ballot at the June 1982 primary election an initiative measure relating to 'Criminal Justice' and entitled (in ¶ 1 thereof) 'The Victims' Bill of Rights.' Petitioners assert that respondent has failed to comply with certain statutory provisions regarding the number of valid signatures required to qualify the measure for the ballot, and that the (Continued)

(Footnote continued from previous page.) proposed measure is unconstitutional because it contains more than one subject (Cal.Const., art. II, § 8, subd. (d)) and amounts to a 'revision' of the Constitution rather than an 'amendment' thereto (see id. art. XVIII, §§ 1-3).

"The proponents of the initiative measure duly presented to the appropriate public officials petitions containing 663,409 signatures. The number of valid signatures necessary to qualify the measure for the ballot under article II, section 8, subdivision (b), of the Constitution is 553,790. Upon examination of the certificates submitted by County officials on the basis of the random sampling provided for in the Elections Code, respondent determined that the petitions contained 108.76 percent of the number of signatures required for a place on the ballot. Respondent refused to take steps to submit the measure to the voters on the ground that the number of valid signatures disclosed by the sample fell short of the 110 percent then required by section 3520, subdivision (g). Instead, she ordered local election officials to verify each signature.

"The proponents of the measure, real parties in interest in the present proceeding, sought a writ of mandate before the Superior Court of Sacramento County to compel respondent to certify the initiative as having qualified for the ballot, and to take the steps required by law to place it before the voters. Respondent took the position that, although she was prohibited by law from certifying the petitions because random sampling (Continued)

(Footnote continued from previous page.) indicated fewer than 110 percent valid signatures, she was nevertheless of the opinion that the 108.76 percent valid signatures found on the petitions constituted substantial compliance with the requirement of the Elections Code to qualify the measure for the ballot without the need for verification of each signature. Following entry of a judgment, stipulated by the parties, to the effect that real parties had substantially complied with the requirements of the Elections Code so as to qualify the initiative for the ballot, a writ of mandate was issued by the trial court directing respondent to certify the initiative for the June 8, 1982, Primary Election, and to take other steps required by law to place the measure before the voters in that election.

"Thereafter, petitioners, who are electors in various counties of the state, filed with us an original petition for writ of mandate and prohibition to prevent respondent from certifying the initiative and to restrain her from performing any act in aid of submission of the measure to the voters. Because of the importance of the questions presented and the time constraints involved, we issued an alternative writ of mandate and expedited briefing and oral argument. (Clean Air Constituency v. California State Air Resources Bd. (1974) 11 Cal.3d 801, 808 [114 Cal.Rptr. 577, 523 P.2d 617] and cases cited.) We also issued a stay prohibiting enforcement of the trial court's writ of mandate pending final disposition of the present proceeding.
(Continued)

(Footnote continued from previous page.)

"While this litigation was pending, the Legislature passed, and the Governor signed, an urgency measure (Stats. 1982, ch. 102) providing that if, on or before January 28, 1982, the Secretary of State received from the several county clerks certificates, based on a random sampling technique, establishing that the number of valid signatures affixed to an initiative petition is more than 105 percent of the number of qualified voters needed, the petition shall be deemed to have qualified for the ballot. The Secretary of State received such certificates on or before January 28, 1982.

"We conclude that the initiative measure shall be placed on the ballot of the June 1982 primary election.

"We do not reach the other issues raised by petitioners. As we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity. (E.g., Mulkey v. Reitman (1966) 64 Cal.2d 529, 535 [50 Cal.Rptr. 881, 413 P.2d 825]; Wind v. Hite (1962) 58 Cal.2d 415, 417 [24 Cal.Rptr. 683, 374 P.2d 643]; Gayle v. Hamm (1972) 25 Cal.App.3d 250, 256-257 [101 Cal.Rptr. 628].)

"The stay of enforcement of the judgment in Sacramento Superior Court, No. 301007, is vacated, and the peremptory writs of mandate and prohibition are denied. The judgment is final forthwith."

court concluded "[t]hat the initiative measure shall be placed on the ballot of June 1982 primary election." The Brosnahan court also vacated its earlier stay of the judgment in superior court case No. 301007 which was followed by the certification of the initiative proposition for election by the Secretary of State.

We hold that Proposition 8 was constitutionally eligible to be placed on the June 8 primary ballot. The initiative was "qualified" when so ordered by the superior court on January 22, 1982, well in excess of the 131-day requirement. The fact that the state Supreme Court first granted a stay of enforcement of case No. 31007 and then vacated it on less than the 131-day period does not negate qualification. To hold otherwise would permit the opponents of any initiative to literally throw a monkey wrench into an

initiative's qualification machinery by merely filing a lawsuit and making only a colorable showing for a stay order. Such a result would be not only unreasonable but ridiculous.

Even if the June 8, 1982, election is not construed to be a "general election," it was a "statewide special election" for purposes of all 12 initiatives then on the statewide ballot. (See fn. 8, ante.) Any other reading of article II, section 8, subdivision (c), would invalidate not only Proposition 8 but also all the other initiatives passed by the voters in this and other earlier June statewide primary elections. It also would require re-submission of all 12 propositions on the June 1982 ballot plus resubmission of countless propositions on the primary ballot in previous years. Such an absurd result would be unconscionable and

unacceptable. "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter." (McFadden v. Jordan (1948) 32 CA1.2d 330, 332 [196 P.2d 787]; Perry v. Jordan (1949) 34 Cal.2d 87, 90, 91 [207 P.2d 47].)

Finally, the state Legislature passed an urgency measure (see fn. 8, ante) that Proposition 8 be deemed to be "qualified" for the June ballot provided on or before January 28, 1982, the Secretary of State received county clerk certificates, based on random samplings, establishing that the number of valid signatures affixed to the initiative petition was more than 105 percent of the number of qualified voters needed. Such certificates were received by the Secretary of State on or before January 28, 1982.

B. Is proposition 8 invalidated by the Single-subject rule? No.

(4) Defendant next argues that Proposition 8 in its entirety is unconstitutional on its face because it violates the "single-subject" rule in California Constitution, article II, section 8, subdivision (d).[11] Defendant's reliance on Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208 [149 Cal.Rptr. 239, 583 P.2d 1281], and Brosnahan v. Eu, supra, 31 Cal.3d 1, in support of this argument is misplaced.

We construe the language and holding in Amador Valley to be supportive of the constitutionality of Proposition 8 in that the court there applied the "reasonably

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11. California Constitution, article II, section 8, subdivision (d) (added Nov.8, 1966) provides: "An iniative measure embracing more than one subject may not be submitted to the electors or have any effect."

germane" test in rejecting a challenge to the constitutionality of Proposition 13 (the Jarvis-Gann tax initiative) on the grounds that Proposition 13 violated the single-subject rule. The Brosnahan case is inapplicable since the majority of the court declined to address the single-subject issue prior to Proposition 8 being placed on the ballot. The dissenting opinion of Chief Justice Bird and the concurring and dissenting opinion of Justice Mosk, which concluded that Proposition 8 did violate the single-subject rule by employing the "functionally related" test, is not a binding precedent. (31 Cal. 3d at pp. 11, 17.) (See discussion, infra.)

We hold that the single-subject rule does not render Proposition 8 unconstitutional as a whole because it satisfies the requirements favoring the constitutionality of both legislation and initiatives

under the "reasonably germane" test as discussed by the state Supreme Court in landmark cases dating back 50 years.

The case of Evans v. Superior Court (1932) 215 Cal. 58 [8 P.2d 467], interpreted the single-subject rule in relation to the legislative act establishing the Probate Code. The code was upheld as not embracing more than one subject. The act contained approximately 1,700 sections which dealt with such matters as the custody, disposal by will, succession, administration, and distribution of decedents' estates and the custody and administration of estates of persons under guardianship.

The single-subject requirement for initiative measures was added to the California Constitution as article II, section 8, subdivision (d), in November 1966. (See fn. 11, ante.)

In Perry v. Jordan, supra, 34 Cal.2d 87, the issue before the court was an initiative constitutional amendment which sought to repeal an article of the California Constitution relating generally to "aid to needy, aged and blind." The opponents of the initiative argued that the measure had four different purposes and claimed it had in all 18 incidental purposes. (34 Cal.2d at p. 93.)

The Perry court construed the single-subject provision adopted in 1948 (see fn. 11, ante) as upholding the validity of the proposed constitutional amendment. The court utilized the principles set forth in the case law interpreting the single-subject rule for legislation and quoted at length from Evans v. Superior Court, supra, 215 Cal. 58, pages 62-63, as follows (34 Cal.2d at pp. 92-93): "Numerous provisions, having one general object, if

fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute a single scheme may be properly included within a single act. (Barber v. Galloway, 195 Cal. 1, 3 [231 P. 34].) The Legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested thereby, (Treat v. Los Angeles Gas Corp., 82 Cal.App. 610 [256 P. 447].) Provisions which are logically germane to the title of the act and are included within its scope may be united. The general purpose of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents. (Estate of Wellings, 192 Cal. 506, 519 [221 P. 628]; Buelke v. Levenstadt, 190 Cal. 684, 687 [214 P. 42];

and cases cited.) The language of this court in Robinson v. Kerrigan, 151 Cal. 40, 51. . ., is especially applicable to this case at this point. A provision which conduces to the act, or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose is germane within the rule. . . .'"

The Perry court further noted (again quoting from Evans) at page 92 that; "' . . . the [single-subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane. (Heron v. Riley, 209 Cal. 507, 510 [289 P. 160].) The provision was not enacted to provide means for the overthrow of legitimate legislation. (McClure v. Riley, 198 Cal.

23, 26 [234 P. 429].). . .'" (Italics added.)

In Amador Valley Joint Union High School Dist. v. State Board of Equalization, supra, 22 Cal.3d 208 (Bird, C. J. concurring and dissenting by reason of violation of the equal protection clause) the state Supreme Court, applying the reasonably germane test, held that Proposition 13, (the Jarvis-Gann tax initiative which added article XIII A to the state Constitution imposing real property assessment and tax rate limitations and restrictions on state and local taxes) satisfied the single-subject rule.

The Amador Valley court quoting from Evans stated at pages 229, 230: "'[T]he [single-subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation,

all parts of which are reasonably germane. [Citation.][¶] Numerous provisions, having one general object, if fairly indicated in the title may be united in one act. Provisions governing projects so related and interdependent as to constitute a single scheme may be properly included within a single act. [Citation.]'" (22 Cal.3d 208, 229-230.) (Italics in original.)

In Amador Valley the court referring to Perry stated at page 230: "We thus draw from Perry its primary lesson that an initiative measure will not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are 'reasonably germane' to each other. We note also the existence of a more restrictive test recently proposed in the dissenting opinion of Justice Manuel in Schmitz v. Younger (1978) 21

Cal.3d 90, 100 [145 Cal.Rptr. 517, 577 P. 2d 652], wherein he suggested that 'an initiative's provisions must be functionally related in furtherance of a common underlying purpose.' Our analysis of article XIII A convinces us that the several elements of that article satisfy either standard in that they are both reasonably germane to, and functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief." (22 Cal.3d at pp. 229-230.) (Italics added.)

The Amador Valley court noted that two purposes of this single-subject rule were 1) to minimize the risk of voter confusion and deception[12] and 2) to avoid

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12. The Amador Valley court concluded the risk of voter confusion was "diluted" by taking judicial notice of the fact that the measure received a great deal of public attention prior to the election and (Continued)

exploiting the initiative process by combining in a single measure several provisions which might not have commanded majority support if considered separately.[13] The court found that neither such

(Footnote continued from previous page.) by the fact that the Voter's Pamphlet also contained an elaborate and detailed explanation of the various elements of the measure. (Id., at p. 231.)

13. The Amador Valley court found there was no "exploitation" of the voters simply because the proposition could have been presented as separate propositions as contended by its opponents and that the various elements of Proposition 13 were designed to "interlock with the others to assure an effective tax relief program." (Id., at p. 232.) The court stated "Aside from the obvious difficulty of ever establishing satisfactorily such 'independent voter approval,' this standard would defeat many legitimate enactments containing isolated, arguably 'unpopular,' provisions reasonably deemed necessary to the integrated functioning of the enactment as a whole. We avoid an overly strict judicial application of the single-subject requirement for to do so could well frustrate legitimate efforts by the people to accomplish integrated reform measures. As we have previously observed, the initiative procedure itself was specifically intended to accomplish such kinds of reforms through its (Continued)

purpose was frustrated by the passage of Proposition 13.

In Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 40-41 [157 Cal.Rptr. 855, 599 P.2d 46], the California Supreme Court considered whether the initiative concerning The Political Reform Act of 1974 violated the single-subject rule. That initiative had four major subjects: 1) regulation of election to public office, 2) regulation of ballot measures, petitions and elections, 3) regulation of public official conflicts of interest, and 4) the regulation of lobbyists.

After tracing the history of the

(Footnote continued from previous page.) function as a 'legislative battering ram.' We should dull or blunt its force only for reasons that are constitutionally mandated, and accordingly we conclude that article XIII A does not violate the single-subject requirement of article II." (22 Cal.3d at p. 232.) (Italics added.)

single-subject requirement for initiative measures from its inception and the application of the reasonably germane test the Fair Political Practices court concluded "Consistent with our duty to uphold the people's right to initiative process, we adhere to the reasonably germane test and, in doing so, find that the measure before us complies with the one subject requirement." (25 Cal.3d 33, 41.) (Italics added.)[14]

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14. We quote at length from the majority opinion by Justice Clark in the Fair Political Practical decision explaining the reasons for adhering to the "reasonably germane" test as distinguished from a more restrictive test as urged by the real party in interest. "'The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved to them. Declaring it "the duty (Continued)

(Footnote continued from previous page.) of the courts to jealously guard this right of the people" (Martin v. Smith (1959) 176 Cal.App.2d 115, 117 [1 Cal.Rptr. 307]), the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process." (Marvynne v. Acker . . . 189 Cal.App.2d 558, 563 [11 Cal. Rptr. 340]). "[I]t has long been our judicial policy to apply a liberal construction to this power whenever it is challenged in order that the right may be not imporperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it." (Mervynne v. Acker, supra, 189 Cal. App.2d 558, 563-564; Gayle v. Hamm . . . 25 Cal.App.3d 250, 258 [101 Cal.Rptr. 628]).' Associated Home Builders etc. Inc. v. City of Livermore (1976) 18 Cal.3d 582, 591 [135 Cal.Rptr. 41, 557 P.2d 473, 92 A.L.R.3d 1038] (fns. omitted); Farley v. Healy (1967) 67 Cal.2d 325, 328 [62 Cal. Rptr. 26, 431 P.2d 650]). [¶] In keeping with that policy favoring the initiative, the voters may not be limited to brief general statements but may deal comprehensively and in detail within an area of law.

". . . . . .

"Although the initiative measure before us is wordy and complex, there is little reason to expect that claimed voter confusion could be eliminated or substantially reduced by dividing the measure into four or ten separate propositions. Our society being complex, the rules governing it whether adopted by (Continued)

(Footnote continued from previous page.) legislation or initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne.

"Nor does the possibility that some voters might vote for the measure--while objecting to some parts--warrant rejection of the reasonably germane test. Such risk is inherent in any initiative containing more than one sentence or even and 'and' in a single sentence unless the provisions are redundant.

". . . . . .

"The enactment of laws whether by the Legislature or by the voters in the last analysis always presents the issue whether on balance the proposed act's benefits exceed its shortcomings. If so, the remedy for short comings is repeal, which will be difficult whether the law is adopted by the Legislature or the people. The difficulty of repeal is merely one factor to be considered by legislators and voters when casting their votes.

"Given the widespread public debate of initiatives, the explanations in the ballot pamphlets and in the media, and the huge volume of legislative business--over 1,000 bills enacted each year--it is unreasonable to assume that the initiative measures receive less scrutiny than proposed legislation.

"The people having reserved the legislative power to themselves as well as having granted it to the Legislature, there is no reason to hold that the people's power is more limited than that of the Legislature, and the single subject requirements applicable to both (Continued)

Turning to the case at bench and our analysis of the text of Proposition 8 contained in the "California Ballot Pamphlet, Primary Election, June 8, 1982" compiled by Secretary of State March Fong Eu, (hereinafter referred to as "Voters Pamphlet" and attached as Appen. A, post, p. 1155) considered in light of Evans, Perry, Amador Valley and Fair Political Practices, and Crawford v. Board of Education (1980) 113 Cal.App.3d 633, 652, fn. 5 [170 Cal.Rptr. 495]), we hold applying the reasonably germane test, that Proposition 8 does not violate the single-subject rule.

(Footnote continued from previous page.) powers (Cal.Const., art. II, § 8, subd. (d); art. IV, § 9) should not be used to establish inequality. (Cf. Associated Home Builders etc., Inc. v. City of Livermore, supra, 18 Cal.3d 582, 591-592.) Accordingly, we adhere to the reasonably germane test for both.

"The provisions of the initiative are reasonably germane to the subject of political practices, and there is no violation of the one subject requirement." (Italics added.) (25 Cal.3d at pp. 41-43.)

Proposition 8 amends the Constitution by deleting section 12 of article I dealing with bail and by adding section 28 to article I. Section 28 sets forth six provisions all dealing with the criminal justice system in the areas of law enforcement and criminal procedure. The areas are restitution in criminal cases, the right of students and staff to be safe at school, evidence at criminal proceedings, bail, and use of prior convictions in criminal proceedings. It is made quite clear from the preamble to this section (subdivision (a)) that the "Right to Safe Schools" is a right to be free from criminal conduct. The other provisions on their face concern criminal procedural changes all designed to place emphasis on the rights of the "other party" to a crime--the victim. The initiative also enacts statues which add

certain sections to the Penal Code and the Welfare and Institutions Code. Again each one of these provisions relates to a criminal law and procedure. Each is designed to ensure that those who commit crimes receive proper punishment and that the victims and potential victims of crime receive protection. (See Appen. A, post, p. 1155.)

The "official" title and summary prepared by the Attorney General fairly described in concise terms the scope of Proposition 8. Included in the Voters Pamphlet was the complete text of Proposition 8 for the voters to read. (See Appen. A, post, p. 1155.)

An "Analysis by the Legislative Analyst" William G. Hamm, appearing in the Voters Pamphlet also pointed out that Proposition 8 proposes many changes in the State Constitution and statutory law

that would alter criminal justice procedures and punishments and constitutional rights." Mr. Hamm's analysis went on to summarize the major changes. Both the Attorney General and the Legislative Analyst stressed that approval of the measure would result in major state and local fiscal costs. (See Appen. A., post, p. 1155.)

Each of the several provisions in Proposition 8 are reasonably germane to the one common purpose and general object as expressed in the title of the initiative which is to reform the criminal justice system so that the system will more effectively protect all California citizens--victims and potential victims of crime. Each of the provisions is logically germane to the title. The words "criminal justice" which appear as the first two words of the official title

of the initiative constitute an acceptable abreviation when taken in context and reasonably refer to the entire system of criminal justice. Each of the provisions are auxiliary to and promote this main purpose.

The pro and rebuttal arguments by prominent and knowledgeable governmental officials and citizens involved in Proposition 8 from its inception which are incorporated in the Voters Pamphlet make it absolutely clear that the single general purpose and object of Proposition 8 is directed at reforming California's system of criminal justice to make it more responsive to the needs of all California victims and potential victims of criminal activity. (See the arguments in favor of Prop. 8 by Lieutenant General Mike Curb, Attorney General George Deukmejian, and the pro and rebuttal

arguments of Paul Gann in Appen. A, post, p. 1155.)

Any risk of "voter confusion" in respect to Proposition 8 was dispelled by wide general dissemination of the Voters Pamphlet and heavy media coverage. The Voters Pamphlet (Appen. A, post, p. 1155) was mailed to every household in California where more than one voter with the same surname resided and additional copies were available free by either calling or writing the county clerk or registrar of voters. Each voter could personally read the summary by the Attorney General, the analysis by the Legislative Analyst, the arguments pro and con and the complete text of Proposition 8. We take judicial notice of the massive statewide media coverage prior to the June 8 primary election which included editorial positions taken by leading newspapers discussing the

initiative and its predicted effects. (Evid. Code, § 452, subd. (g).) Interest in and, therefore, understanding of the objective of the initiative and the role each of the provisions played in achieving that goal was heightened by the positions taken on Proposition 8 by candidates during the primary for statewide office as well as media coverage of the pro and con arguments in the Brosnahan case.

Nor has there been an "exploitation" of the voters by not presenting each provision in Proposition 8 to them as a separate initiative. The voters favored the proposition by a vote of 2,770,225 (56.4 percent) to 2,144,284 (43.6 percent). There is no showing, and it would be sheer speculation to assume that the result would have been any different if any provision contained in Proposition 8 had been submitted to the voters as a

separate initiative. To the contrary, the fact that Proposition 4 concerning bail on the same ballot passed by a larger margin of votes than did Proposition 8 which also has a bail provision would tend to indicate that the voters selectively considered each provision in Proposition 8, and there was some aspect of Proposition 8, other than the bail provision, that contributed to the drop off of votes as between the two propositions.[15]

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15. We note, without deciding, that Proposition 4 concerning bail which passed by a larger number of votes than did Proposition 8 may prevail only over those provisions in Proposition 8 relating to bail to the extent there is a conflict in the provisions of the two propositions. California Constitution, article XVIII, section 4, provides: "A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail" (Italics added.)

Furthermore, it would have been impractical and illogical to require the thousands of concerned citizens who carried the petition and the 663,409 citizens who signed the petition to shuffle such a mass of separate petitions directed at the one objective previously discussed. Moreover, if there was a separate initiative process for each provision of Proposition 8, it would have unnecessarily lengthened the ballot and created confusion for all concerned.

We are not unaware of the concurring and dissenting opinion of Justice Mosk and the dissenting opinion of Chief Justice Bird in Brosnahan v. Eu, supra, 31 Cal.3d 1. These justices express the view that the more restrictive functionally related test proposed by Justice Manuel in his dissenting opinion in Schmitz v. Younger, (1978) 21 Cal.3d 90 [145 Cal.Rptr. 517,

577 P.2d 652] should be used to resolve the single subject issue rather than the reasonably germane test. (31 Cal.3d 1, 9, 17.)

The separate opinion of Justice Mosk in Brosnahan states that the more restrictive functionally related test proposed by Justice Manuel in his dissenting opinion in Schmitz v. Younger, supra, 21 Cal.3d 90 was "introduced" in Amador Valley and Fair Political Practices and "in substantial effect it has been adopted by this court. I fully accept it." (31 Cal. 3d 1, 9.)

With due respect, our reading of Amador Valley and Fair Political Practices indicates that those cases did not "introduce" the functionally related test but merely acknowledged its "existence."

The majority opinion in Amador Valley (per Richardson, J., with Tobriner, Mosk,

Clark, Manuel and Newman, JJ. conc.), states: "We note also the existence (italics added) of a more restrictive test recently proposed in the dissenting opinion of Justice Manuel in Schmitz v. Younger (1978) 21 Cal.3d 90, 100 [145 Cal.Rptr. 517, 577 P.2d 652], wherein he suggested that 'an initiative's provisions must be functionally related in furtherance of a common underlying purpose.' Our analysis of article XIII A convinces us that the several elements of that article satisfy either standard in that they are both reasonably germane to, and (italics original) functionally related in furtherance of a common underlying purpose, namely, effective real property tax relief." (22 Cal.3d 208, 230.) Since Proposition 13 (the Jarvis-Gann tax initiative) met both the reasonably germane and functionally related tests,

we construe the notation of the "existence" of the latter as merely the driving of another nail into the lid of the empty coffin into which the opponents of Proposition 13 wished to place it.

Our reading of Fair Political Practices discloses that the majority did not there "introduce" the functionally related test. To the contrary the Fair Political Practices majority opinion (per Clark, J., with Mosk and Richardson, JJ., conc.)[16] in over five pages discussing the single-subject rule only briefly mentioned the existence of the dissent of Justice Manuel in Schmitz v. Younger, supra, 21 Cal.3d 90. Justice Clark

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16. Justice Newman in a concurring and dissenting opinion stated "I agree with the majority conclusion that the single subject rule has not been violated." (25 Cal.3d 33, 50.)
Justice Tobriner concurred on the basis of the functionally related test. Justice Manuel dissented by applying the same test.

stated emphatically that "Consistent with our duty to uphold the people's right to initiative process, we adhere to the reasonably germane test and, in doing so, find that the measure before us complies with the one subject requirement." (25 Cal.3d 33, 41.)

Accordingly, in our opinion, the functionally related test was not "in substantial effect" adopted (whatever that means legally) by the Amador Valley and Political Practices decisions. We are bound by the reasonably germane test which remains the law today. That test has served Californians well during the past 50 years and was applied as recently as 1978 in the Amador Valley case and 1979 in Fair Political Practices. Nor do we perceive any logical or persuasive reason to suddenly jettison the reasonably germane test in favor of the more restric-

tive functionally related test. The fact that California's criminal justice system ox is being gored by Proposition 8 is not a legally cognizable reason for such a sudden flip-flop in the test used for resolving the single-subject issue presented in this case.

In sum, we do not view Proposition 8 as the result of a so-called "log rolling" exercise. (See, Schmitz v. Younger (1978) 21 Cal.3d 90, 93, 97 et seq. (dis. opn.) [145 Cal.Rptr. 517, 577 P.2d 652]; Fair Political Practices Com. v. Superior Court, supra, 25 Cal.3d 33, 40.) The Proposition 8 "log" was used by the 2,770,225 concerned citizens who voted for it as an "[initiative] battering ram" (see, Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, supra, 22 Cal. 3d 208, 232 and fn. 12, ante)for the legitimate purpose of protecting all

California citizens--victims or potential victims of crime by bringing about reasonable and meaningful reform in California's criminal justice system.

(5) (See fn. 17.) We hold that Proposition 8 does not violate the single-subject requirement of article II, section 8, subdivision (d) of the California Constitution.[17]

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17. Assuming, arguendo, that the functionally* related ** test is applied,

*"Function" is defined in Black's Law Dictionary (5th ed. 1979) West Publishing Co., St. Paul, Minn., as: "Derived from Latin 'functus,' the past participle of the verb 'fungor' which means to perform, execute, administer . . . . The nature and proper action of anything; activity appropriate to any business or profession. . . . Office; duty; fulfillment of a definite end or set of ends by the correct adjustment of means." (Italics added.)

**"Related" is defined in Webster's Third New International Dictionary (1976), Merriam-Webster, G. & C. Merriam Company, Springfield, Mass., as "having a relationship: connected by reason of an established or discoverable relation," and "Relation" is defined as "a logical bond; the state of being mutually or reciprocally interested." (Continued)

C. Is Proposition 8 a constitutional amendment or revision? An amendment.

(6a) Defendant Wilson next contends that Proposition 8 is a constitutional "revision" as distinguished from an "amendment" and therefore unconstitutional. Defendant and the State Public Defender as amici, relying on McFadden v. Jordan,

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(Footnote continued from previous page.) we would still hold that Proposition 8 complies with the requirements of the single-subject rule. The only requirement of the functionally related test is that the various provisions of an initiative measure be "functionally related in furtherance of a common underlying purpose." (Amador Valley, supra, 22 Cal.3d 208, at p. 230.) The functionally related standard only precludes "the amalgamation of unrelated provisions" under some "broad umbrella" of a topic; it permits complete but focused initiatives. (Schmitz v. Younger, supra, 21 Cal.3d at pp. 100-101 (dissent).) Proposition 8 focuses on the rights of crime victims. Each of its provisions is related in furtherance of its purpose to reform the criminal justice system to make it more responsive to the needs and rights of victims and potential victims of crime.

Proposition 8 does not constitute a comprehensive revision of the entire (Continued)

(Footnote continued from previous page.) criminal justice system, although its provisions cover different areas within the subject of criminal justice. It is readily apparent that many of the various provisions of Proposition 8 could have been the subjects for separate ballot propositions. However, none of the cases construing the single-subject requirement to date suggests that the above facts alone demonstrate Proposition 8 violates the single-subject rule.

The provisions of an initiative measure under the functionally related test only need be functionally related, not functionally interdependent. Each provision need not be like a precisely machined gear of a fine watch which must mesh with the others in the operation of a sole function. Neither the provisions of Proposition 13 nor the provisions of the Political Reform Act of 1974 could meet such a stringent standard. Yet the Supreme Court found that both measures satisfied the single-subject rule. Such precision is not required in the drafting of a "[initiative] battering ram." (Amador Valley, supra, 22 Cal.3d 208, 228, 232.)

The relationship between the various provisions of an initiative need only be "in furtherance of the common purpose." They all simply must be directed to the same end whether it be real property tax relief, political reform, or, as in Proposition 8 reform of the criminal justice system as it relates to the actual and potential victims of crime. Proposition 8's provisions are both reasonably germane and functionally related to the furtherance of its overall purpose--increased protection for the rights of victims and potential victims of crimes.

supra, 32 Cal.2d 330, argue that Proposition 8 is a revision of the California Constitution because the various provisions of the initiative effect changes in three codes and alter protections provided by at least seven sections of the California Constitution.

We hold that Proposition 8 is a constitutional amendment and not a constitutional revision and that it was therefore properly adopted by the initiative process. Our reasoning follows:

(7) It is clear that while the voters may amend the state Constitution through the initiative process set forth in article II, section 8, the Constitution may be revised only by two methods set forth in article XVIII. Under the first method, the Legislature must postpone the revision to be submitted to the voters and under the second, the Legislature must

submit to the voters at a general election the question of whether to call a constitutional convention. (Amador Valley, supra, 22 Cal.3d 208, 221.) Thus an initiative measure may not "revise" the Constitution. (Id.)

The defendant's reliance on McFadden v. Jordan, supra, 32 Cal.2d 330 is misplaced. In McFadden the Supreme Court in August 1948 struck down an initiative measure which would have added 21,000 words to the existing Constitution as being an attempt to revise rather than amend the Constitution. That initiative measure dealt with varied and diverse subjects including pensions, gambling, taxes, oleomargarine, healing arts, civic centers, senate reapportionment, fish and game, and surface mining. Its enactment would have repealed or substantially altered at least 15 of the then 25 articles in the

Constitution.

Of significance here is the fact that the Supreme Court in McFadden could not apply the single-subject rule to the challenged initiative measure since that constitutional requirement was enacted at the same election at which the challenged initiative measure was scheduled to be submitted to the voters.

The amendment/revision rationale became much less important after enactment of article II, section 8, subdivision (d), of the California Constitution and was not of necessity considered in the Fair Political Practices case where the Political Reform Act initiative was held not to be violative of the single-subject rule.

In Amador Valley, supra, the state Supreme Court considered the contention that Proposition 13 was a revision rather

than an amendment to the Constitution. The court reexamined its holdings in McFadden and in Livermore v. Waite (1894) 102 Cal. 113 [36 P. 425], an earlier decision upon which the McFadden court relied, and stated: "Taken together our Livermore and McFadden decisions mandate that our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also. In illustra-

(Footnote continued from previous page.) we would still hold that Proposition 8 complies with the requirements of the single-subject rule. The only requirement of the functionally related test is that the various provisions of an initiative measure be "functionally related in furtherance of a common underlying purpose." (Amador Valley, supra, 22 Cal.3d 208, at p. 230.) The functionally related standard only precludes "the amalgamation of unrelated provisions" under some "broad umbrella" of a topic; it permits complete but focused initiatives. (Schmitz v. Younger, supra, 21 Cal.3d at pp. 100-101 (dissent).) Proposition 8 focuses on the rights of crime victims. Each of its provisions is related in furtherance of its purpose to reform the criminal justice system to make it more responsive to the needs and rights of victims and potential victims of crime.

Proposition 8 does not constitute a comprehensive revision to the entire criminal justice system, although its provisions cover different areas within the subject of criminal justice. It is readily apparent that many of the various provisions of Proposition 8 could have been the subjects for separate ballot propositions. However, none of the cases construing the single-subject requirement to date suggests that the above facts alone demonstrate Proposition 8 violates the single-subject rule.

The provisions of an initiative measure under the functionally related test only need be functionally related, not functionally interdependent. Each provision need not be like a precisely machined gear of a fine watch which must mesh with

(Continued)

tion, the parties herein appear to agree that an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change." (Amador Valley, supra, 22 Cal.3d at p. 223.)[18] (Italics added.)

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18. The Supreme Court in Amador Valley found that Proposition 13 in enacting article XIII A, was not a revision of the Constitution. In regard to article XIII A's quantitative effect on the Constitution, the court noted that it only contained 400 words and significantly affected only one other article of the Constitution--article XIII.

With respect to its qualitative effect on the basic plan of government, the Amador Valley court rejected the argument that the amendment fundamentally altered the system of "home rule" and the "republican" form of government. As to the "loss" of home rule, the court noted that the article's restrictions did not destroy the power of local agencies to tax or to control and allocate disbursements of funds. The court while acknowledging "that it is apparent that article XIII A will result in various substantial changes in the operation of the former system," found (Continued)

(6b) Under the quantitative and qualitative test of Amador Valley, Proposition 8 is an amendment and not a revision of the state Constitution. In quantitative effect the constitutional amendment portion of Proposition 8 is not extensive. It adds less than 700 words, approximately one-fourth of which constitute a preamble. It expressly repeals only one section of the Constitution and adds only one. The repealed section dealt with bail and pretrial release. There is no comparison between the quantitative aspects of this amendment and the "amendment" ruled invalid in Mc Fadden.

With respect to the qualitative nature of Proposition 8, it obviously does not restructure the basic plan of government.

(Footnote continued from previous page.) the amendment "adds nothing novel to the existing governmental framework of this state." (Amador Valley, supra, 22 Cal. 3d at p. 228.)

The fact the amendment may have a significant fiscal impact on local and state government does not make it a "revision." (Cf. Amador Valley, supra.)

From both a qualitative and quantitative viewpoint, Proposition 8 is considerably less expansive than the Political Reform Act Initiative of 1974, upheld as valid, which contained more than 20,000 words and which covered such diverse subjects as elections, public officers, and lobbyists.

(8) In summary, we hold that Proposition 8 was constitutionally eligible for the June 1982 primary ballot, does not violate the single-subject requirement of article II and is a constitutional amendment as distinguished from a constitutional revision. We hold that Proposition 8 on its face is a valid constitutional amendment which became effective

on June 9, 1982.

D. Does Proposition 8 comply with fundamental constitutional purposes and principles? Yes.

Proposition 8 is in complete harmony with the basic purpose of our American form of constitutional government. Broad constitutional principles reinforce, buttress and underpin our holdings on the narrower constitutional issues raised in the instant case, as hereinbefore discussed. Indeed, to hold other than we have in respect to the narrower constitutional issues would not merely strike a discordant note with, but would also violate, those basic overriding constitutional purposes and principles. We deem it necessary and appropriate to again review historically and reaffirm, those basic constitutional purposes and principles and assess their relationship to the case at bench.

The founding fathers of this democratic republic deliberated on the most persistent and perplexing of all political problems, the tensions between the claims of order and the claims of freedom. They tipped the balance in favor of social order. (See Kirk, The Roots of American Order, sponsored by Pepperdine University, Open Court, La Salle, Ill., 1974.)[19]

The three major historic documents the United States had produced ((1) the Declaration of Independence, (2) the Constitution, and (3) the Federalist) all confirm that the fundamental purpose of our American form of government is to provide security for its citizens from

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19. The frontispiece states: "The preparation of this book has been sponsored by Pepperdine University as a contribution toward the celebrating of the Bicentennial of the United States; it is meant to assist in renewing an apprehension of America's moral and social order among the general public and among university and college students."

threats both outside and within its borders, so they may enjoy their individual freedoms.

The Declaration of Independence was written by the 33-year-old Thomas Jefferson in the parlor of his second floor walkup in Philadelphia in a half-day's time. This document with only a few corrections was reported to Congress.

On July 4, 1776, the Declaration was signed by 56 of our founding fathers, 24 of whom were lawyers and jurists. The second paragraph of the Declaration states: "We hold these truths to be self-evident that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the

governed."

The revolution and the Declaration of Independence made America an independent nation. The Constitution made us a united nation. On May 14, 1787, the historic constitutional convention convened in Constitution Hall in Philadelphia. Following four months of stormy debate in secret session the delegates hammered out the Constitution, which was ratified on September 17, 1787. The Constitution became our blueprint for order and liberty under law. The preamble to the Constitution states the purpose of the Constitution: "We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and

establish this Constitution for the United States of America."

On December 15, 1791, in fulfillment of a promise to the anti-Federalists, the first 10 amendments (the Bill of Rights) were adopted to serve as a legal canopy for protection of personal freedoms from governmental encroachment. However, "[P]rimarily, governments exist for the maintenance of social order." (Chicago v. Sturges (1911) 222 U.S. 313, 322 [56 L.Ed. 215, 220, 32 S.Ct. 92].) "The Bill of Rights was not intended to deny that primary mission. This is not to belittle the inestimable rights thus consecrated, but rather to say that those rights may not be read to defeat the very reason for government itself." (State v. Bisaccia (1971) 58 N.J. 586 [279 A.2d 675].)

"The Federalist" is a series of 85 essays written by Alexander Hamilton,

James Madison and John Jay between October 1787 and May 1788. The essays were printed, under the pseudonym of "Publius" in New York newspapers to persuade the people of New York to ratify the new federal Constitution. Thomas Jefferson acclaimed "The Federalist" as "The best commentary on the principles of government ever written."

"The Federalist" is accepted as an authoritative treatise on the principles of the American constitutional form of government and has often been quoted in Supreme Court decisions. An analysis of "The Federalist" compels the conclusion that the founding fathers designed the federal Constitution to insure that the people are sovereign and to provide for an orderly society as clearly stated in

the Preamble. (See "The Federalist," Franklin Library, Franklin Center, Pa., 1977.)

The California State Constitution has, in substance, adopted the primary purpose and basic principles of the federal Constitution. Article I, section 1 of the Constitution of the State of C California proclaims: "All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy."

Of particular significance to the case at bench and Proposition 8 is article II, section 1 of the California Constitution,

which declares: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."

The passage of Proposition 8 should come as no surprise in view of the Preamble to the federal Constitution, and article I, section 1 and article II, section 1 of California's Constitution,

and the escalating crime problem. After the cabooses of the Proposition 13 (the Jarvis-Gann tax initiative) and the Proposition 1 (the antiforced busing initiative) trains cleared the polling station, Proposition 8 (the victims' Bill of Rights initiative) could be heard coming down the track without putting an ear to the rail.

The Proposition 8 initiative was passed because of the public's perception that the stewards of the criminal justice system had failed to come to grips in a realistic and common sense manner with the mounting crime wave. (See fn. 20 below[20] and the FBI Crime Index statistics on California, infra.)

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20. See Murrett, Hear Ye! Hear Ye! Hear Ye! The Courts Will Now Listen to the Public, the Judges Journal, published
(Continued)

It is the duty of every governmental agency and official in all three branches of government affected by Proposition 8

(Footnote continued from pervious page.) by the American Bar Association, (Spring 1982, vol. 21, No. 2). The article discusses "The National 1978 Yankelovich Poll" which reflected public expectations and concerns with the courts.

The Yankelovich Poll Report stated: "The following principle expectations of the public emerge: (1) courts should protect society; (2) courts should insure equality and fairness; (3) quality performance by courts and court personnel is measured by responsiveness, competence, and accessibility. These expectations are simultaneously held. Perceived failure to meet these expectations underlies the desire for reform"

The Yankelovich Poll concluded that: "Street crime was viewed by 88 percent as the most serious public problem. While the public by no means expects courts alone to solve the crime problem, it does clearly expect them to play a key role. Courts are currently not fulfilling this expectation for a large segment of the American public. The perceived inability of courts to reduce the crime rate is the most serious of all court problems studied. Despite the current level of perceived toughness, sentences are viewed as not quite tough enough.

to implement the various provisions of the initiative in accordance with the will and command of the sovereign people. Disputes which may arise over the implementation of any particular provision in the initiative will of necessity have to be resolved by the third branch in accordance with controlling law.

III

"Truth in Evidence" Provision

A. General:

Proposition 8 adds to article I of the state Constitution section 28, subdivision (d), which provides: "Right to Truth in Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceed-

ing, including pretrial and post conviction motions and hearings or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional rights of the press." (Italics added.)

(9) We conclude that the above Truth-in-Evidence provision of Proposition 8 (§ 28, subd. (d)) which became effective on June 9, 1982, repealed by implication section 1538.5, subdivision (d)[21] and modified article I, sections

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21. Section 1538.5, subdivision (Continued)

13[22] and 24[23] of the California Constitution to the extend that they may conflict.

It is common knowledge that since the adoption by the people in 1974 of article I, sections 13 and 24, of the California Constitution, California

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(Footnote from previous page continued.) (d), in relevant part provides that: "[i]f a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section or section 1238 or Section 1455 are utilized by the people." (See fn. 7, ante.)

22. Article I, section 13, of the California Constitution in part provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated. . . ."

23. Section 24 of the California Constitution states in pertinent part that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution. . . . This declaration of rights may not be construed to impair or deny others retained by the people."

courts have used those California constitutional provisions to develop the doctrine of "independent state grounds." The effect of this doctrine, purportedly to secure for the people of this state greater rights than guaranteed by the federal Constitution, has been the suppression of evidence which would have been admissible under federal law. (See People v. Brisendine (1975) 13 Cal.3d 528, 553 [119 Cal.Rptr. 315, 531 P.2d 1099].)

The Truth-in-Evidence provision, as correctly stated by the Legislative Analysis in the Voters Pamphlet "[c]ould not affect federal restrictions on the use of evidence" (see Appen. A, post, p. 1155). This is so by reason of the supremacy of the United States Constitution over state constitutions as recognized in article III,

section 1, of the California Constitution that "The State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

In the arguments presented in the Voters Pamphlet made in favor of Proposition 8, Lieutenant Governor Mike Curb urged voters to ". . . restore balance to the rules governing the use of evidence against criminals . . . ." Attorney General George Deukmejian observed that ". . . higher courts of this state have created additional rights for the criminally accused and placed more restrictions on law enforcement officers. This proposition will overcome some of the adverse decisions by our higher courts." The analysis by the Legislative Analyst

informed the voters that "The California criminal justice system is governed by the State Constitution, by statutes enacted by the Legislature and the people and by court rulings." Furthermore, article I, section 28, subdivision (d), "could not affect federal restrictions on the use of evidence." (See Appen. A, post, p. 1155.)

Generally speaking, the Truth-in-Evidence provision by its plain language effectively abolishes the application of the Exclusionary Rule in any criminal proceeding under California constitutional, statutory, and decisional law to the extent that such laws may conflict with the federal law.

The voters on June 8, 1982, were given a choice between adopting the California or federal standards on the

admission of relevant evidence. The rebuttal argument to Proposition 8 informed the voters that the proposition would make radical changes in the state Constitution. The passage of Proposition 8 was a clear repudiation, by the people, of state law embellishments on federal decisions which operate to exclude relevant evidence from criminal proceedings.

The repeal by implication of section 1538.5 subdivision (d) and article I, sections 13 and 24, of the California Constitution by the people in the Truth-in-Evidence provision of Proposition 8 (§ 28, subd. (d)) is supported by well recognized rules of construction.

(10) In Otsuka v. Hite (1966) 64 Cal. 2d 596 [51 Cal.Rptr. 284, 414 P.2d 412], the court stated at page 606: "It has

long been a cardinal rule, of course, that if a provision of the California Constitution is 'capable of two constructions, one of which could cause a conflict with the federal constitution, the other must be adopted.' [Citation omitted.]" Likewise, when a later statute supercedes or substantially modifies an earlier law that law is by implication repealed or partially repealed. (Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs. (1968) 263 Cal.App.2d 41, 54 [69 Cal.Rptr. 480].) Repeals by implication occur only where the two acts are so inconsistent that there is no possibility of concurrent operation or where the later provision gives undebatable evidence of an intent to supersede the earlier. (Ibid.)

The classic rule of construction

which is applicable to a resolution of the impact of section 28, subdivision (d), is set forth in Estate of Pardue (1937) 22 Cal.App.2d 178, 180-181 [70 P.2d 678]: "If a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others, and if a statute specifies one exception to a general rule, other exceptions or effects are excluded; in other words, as has been frequently held, a general provision of a statute is controlled by a specific and express exception. It is an elementary rule of construction that the expression of one excludes the other. And it is equally well settled that the court is without power to supply an omission." (Accord, In re De Neef (1941) 42 Cal.App. 2d 691, 694 [109 P.2d 741].)

Defendant Wilson contends that the Truth-in-Evidence provision of Proposition 8 (§ 28, subd. (d)) should not be applied retroactively to this case and to do so would violate the proscription against ex post facto laws and deny him equal protection and due process of law. The resolution of these contentions necessarily includes consideration of the source, declared purpose, and the effect of the Exclusionary Rule in criminal proceedings.

The Exclusionary Rule can be defined as a rule of evidence which prohibits the admission into evidence at trial of that which was later determined by a court to have been obtained by a government agent as a result of "unreasonable search and seizure" in violation of the Fourth Amendment to the United States Constitution and the comparable provision in the

California Constitution.

The Exclusionary Rule was not known to the common law. Its foundation as a rule of evidence was laid in 1886 in the case of Boyd v. United States (1886) 116 U.S. 616 [29 L.Ed. 746, 6 S.Ct. 524]. The rule was first applied in 1914 in federal courts (Weeks v. United States (1914) 232 U.S. 383 [58 L.Ed. 652, 34 S.Ct. 341]) and adopted by the California Supreme Court in 1955 (People v. Cahan (1955) 44 Cal.2d 434 [282 P.2d 905, 50 A.L.R.2d 513]). The United States Supreme Court extended the rule in 1961 to all state courts (Mapp v. Ohio (1961) 367 U.S. 643 [6 L.Ed.2d 1081, 81 S.Ct. 1684, 84 A.L.R.2d 933]).

In 1967 the California Legislature embalmed the rule in section 1538.5. The California Supreme Court in People v.

Belleci (1979) 24 Cal.3d 879 [157 Cal.Rptr. 503, 98 P.2d 473] overruled decisions permitting limited use of suppressed evidence for purposes other than determination of guilt theorizing that language in subdivision (d) stating that evidence suppressed pursuant to section 1538.5 "shall not be admissible against the movant at any trial or other hearing," constituted a limited "statutory exclusionary rule." Belleci thereby banned use of previously suppressed evidence for purposes of parole and probation revocation, sentencing, and impeachment at trial.

The Exclusionary Rule was premised upon the assertion that exclusion was the only available sanction which would effectively discourage and deter improper police methods and which would thereby protect the citizen's right to freedom

from unreasonable searches and seizures guaranteed by the Fourth Amendment to the Constitution of the United States. "The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." (Elkins v. United States (1960) 364 U.S. 206, 217 [4 L.Ed.2d 11669, 1677, 80 S.Ct. 1437]; italics added.)

In United States v. Calandra (1973) 414 U.S. 338, 348 [38 L.Ed.2d 561, 571, 94 S.Ct. 613], Justice Powell, writing for the court, concluded: "In sum, the Exclusionary Rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, ..." (Italics added.)

Unquestionably the sovereign people of California have the right and power through the initiative process to amend remedies, previously put into effect to enforce individual state and federal constitutional rights, in order to make state remedies coincide with those supplied under federal law.

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Instructive in resolving the issues present here in respect to the Truth-in-Evidence provision is the teaching of the recent United States Supreme Court opinion in Crawford v. Board of Education (1982)*-- U.S. -- [-- L.Ed.2d --, -- S.Ct. --] decided on June 30, 1982 (No. 81-38) pertaining to California's Proposition I (the antiforced busing initiative).[24]

While the subject matter of Proposition I (the antiforced busing initiative) in the Crawford case differs from Proposition

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*Advanced Report Citation: 50 U.S.L. Week 5016.

24. The Proposition I initiative amended the due process and equal protection clauses of the California state Constitution to provide that state courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

8 (the "Victims' Bill of Rights" initiative) both initiatives arose out of widespread public dissatisfaction with remedies applied by California governmental agencies, especially the state courts, to enforce individual constitutional rights. In Crawford the equal protection clause of the Fourteenth Amendment and its comparable provision in the California Constitution were involved in the case at bench the unreasonable search and seizure provision of the Fourth Amendment and its counterpart in the California Constitution is involved.

The California Court of Appeal in the Crawford case ((1980) 113 Cal.App.3d 633 [170 Cal.Rptr. 495]) found no obligation on the part of the state to retain a greater state law remedy against racial segragation than was provided by the

federal Constitution.

The United States Supreme Court held in an eight-to-one decision that California's Proposition 1 does not violate the Fourteenth Amendment and affirmed the judgment of the California Court of Appeal decision.

The high court stated: "We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a state's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court." (*--U.S. at p. -- [--L.Ed.2d at p.--].)

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* Advance Report Citation: 50 U.S.L. Week at page 5018.

In rejecting the petitioners' contention in Crawford that Proposition I was unconstitutional on its face, the high court in Crawford pointed out that to repeal the initiative "would limit seriously the authority of states to deal with the problems of an heterogeneous population" and "states would be committed irrevocably to legislation that has proven unsuccessful or even harmful in practice . . . when the State was under no obligation to adopt the legislation in the first place. Moreover, and relevant to this case, we would not interpret the Fourteenth Amendment to require the people of the State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." (**--U.S. at p.--[--L.Ed.2d at

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**Advance Report Citation: 50 U.S.L.Week at pages 5019-5020.

p.--].)

The United States Supreme Court noted that the California Court of Appeal characterized the petitioners' claim that Proposition I was unconstitutional because it was enacted with a discriminatory purpose as "pure speculation" (113 Cal.App. 3d at p. 655). The high court in affirming the judgment of the Court of Appeal stated that "the purposes of the Proposition are stated in its text and are legitimate, nondescriminatory objectives" and "[would] not dispute the judgment of the Court of Appeal or impugn the motives of the State's electorate." (*--U.S. at p.--[--L.Ed.2d at p.--].)

Of particular significance in Crawford is the following statement in the

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* Advance Report Citation: 50 U.S.L. Week at page 5021.

the concurring opinion of Justice Blackmun with whom Justice Brennan joined: "State courts do not create the rights they enforce; those rights originate elsewhere--in the state legislature, in the State's political subdivisions, or in the state constitution itself." (*--U.S. at p.--[--L.Ed.2d at p.--], (italics added.) Justice Blackmun pointed out that "While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political process so much as by simply repealing the right to invoke a judicial busing remedy." (*--U.S. at p.--[--L.Ed.2d at p.--].)

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* Advance Report Citation: 50 U.S.L. Week at page 5021-5022.

States Supreme Court Crawford decision are that Proposition 8 as a whole was born in accordance with "democratic processes and of its ability to experiment" with remedies to provide a more effective system of criminal justice for the protection of victims and potential victims of crime across the spectrum of California society; and that the sovereign people of the State of California society; and that the sovereign people of the State of California have the power to, and did on June 8, 1982, abolish the Exclusionary Rule remedy as enacted in section 1538.5 and also repealed the right of California courts to invoke judicial remedies to enforce Fourth Amendment rights which are more restrictive on law enforcement agencies than those invoked by federal courts under the federal Constitution.

B. Does the Truth-in-Evidence have retroactive application? Yes.

(11a) Defendant Wilson's contention that the Truth-in-Evidence provision of Proposition 8 should not be retroactively applied to this case is not supported by the clear meaning of the provision, by an analogy with federal law, or by persuasive California state law.

The Truth-in-Evidence provision states unequivocally that "... RELEVANT EVIDENCE SHALL NOT BE EXCLUDED IN ANY CRIMINAL PROCEEDING, INCLUDING PRETRIAL AND POST CONVICTION MOTIONS AND HEARINGS ...." (Italics added.) By its very terms, the Truth-in-Evidence provision requires retroactive application. This court is presented with a

pretrial challenge to a denial of the defendant's motion to exclude evidence made pursuant to section 1538.5 which has been abrogated by the Truth-in-Evidence provision in Proposition 8. This court has before it a writ of a pretrial motion, a matter in which review of a criminal proceeding is involved. The procedural posture of the case at bench falls within the ambit of the provision.

(12) The federal Constitution is silent on retroactivity of state law and state courts are not bound by similar discussion by federal courts in this issue. (Gt. Northern Ry. v. Sunburst Co. (1921) 287 U.S. 358, 364-365 [77 L.Ed. 360, 366-367, 53

S.Ct. 145, 85 A.L.R. 254].) However, an analogy can be found within the language of Chief Justice Marshall in United States v. Schooner Peggy (1801) 5 U.S. (1 Cranch) 102, 108-110 [2 L.Ed. 49, 51]): "It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional ... I know of no court which can contest its obligation .... In such a case, the court must decide according to existing laws, and if it

be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside."

The same rule has been followed where a statutory change intervened (Carpenter v. Wabash R. Co. (1940) 309 U.S 23, 27 [84 L.Ed. 558, 561, 60 S.Ct. 416]) and where a constitutional amendment was adopted. (United States v. Chambers (1934) 291 U.S 217, 223 [78 L.Ed. 763, 765, 89 A.L.R. 1510].)

On the federal level the above rule enunciated by Chief Justice Marshall in Schooner Peggy is particularly compelling where a constitutional amendment is adopted. As explained in the Chambers case,

"[T]he principal [sic] involved [constitutional amendment] is thus not archaic but rather is continuing and vital, - that the people are free to withdraw the authority that they have conferred and when withdrawn, neither the Congress nor the courts can assume the right to continue to exercise it." (291 U.S. at p. 226 [78 L.Ed. at p. 767].)

We note that often California's Supreme Court hands down decisions without indicating whether the principles there declared should be given retroactive effect and these decisions affect cases pending in the Court of Appeal. That practice by the state Supreme Court has required this court to resort to criteria developed for determining retroactive

application of decisional law.

(11b) The criteria formulated by the United States Supreme Court and applied by the California Supreme Court for retroactive application of decisional law are instructive. They are: "... (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." (Stovall v. Denno (1967) 388 U.S. 293, 297 [18 L.Ed.2d 1199, 1203, 87 S.Ct. 1967]; In re Love (1974) 11 Cal.3d 179, 187 [113 Cal.Rptr. 89, 520 P.2d 713].)

Criteria (a) (purpose):

"Foremost among these factors is the purpose to be served by the new constitutional rule." (Desist v. United States (1968) 394 U.S. 244, 249 [22 L.Ed. 2d 248, 255, 89 S.Ct. 1030].) Regardless of good-faith reliance upon old rules and the impact on the administration of justice, new rules have been applied retroactively if their major purpose is to enhance substantially the reliability of the fact-finding process. (Adams v. Illinois (1972) 405 U.S. 278, 280 [31 L.Ed.2d 202, 206, 92 S.Ct. 916] (op. of Brennan, J.), quoting Williams v. United States (1971) 401 U.S. 646, 653 [287 L.Ed.2d 388, 395, 91 S.Ct. 1148], e.g., Roberts v. Russell (1968) 392 U.S. 293, 295 [20 L.Ed.2d 1100, 1102,

88 S.Ct. 1921].)

In Williams v. Kidd (1915) 170 Cal. 631 [151 P. 1], the court stated at page 649: "[A]s the purpose of all rules of evidence is to aid in arriving at the truth, if it shall appear that any rule tends rather to hinder than to facilitate this result, to promote rather than to repress fraud, it should be abrogated without hesitation."

The title of the present provision evidence its purpose: "Right to Truth-in-Evidence." Decisions extending Fourth Amendment requirements have been denied retroactive effect because they withhold from the trier of fact relevant and reliable evidence. (E.g., Desist v. United States,

supra, 394 U.S. 244.) This reasoning leads to the conclusion that intervening laws which admit such evidence, previously excluded for reasons extrinsic to the truth-determining process, must be accorded retroactive effect.

The purpose of the Truth-in-Evidence provision is to make more reliable the fact-finding process directed at a search for the truth as to the guilt or innocence of a person charged with a crime. This was accomplished by abolishing the Exclusionary Rule as applied under California law.

Justice Macklin Fleming of the California Court of Appeal (now retired) in his book Of Crimes and Rights (1978) speaks to the effect of

the Exclusionary Rule on the fact-finding process. He suggests that the Exclusionary Rule(s) shuffle(s) "wild cards" into the deck which destroys effectiveness of factual inquiry and credibility by excluding facts that are demonstrably true and that such "[a]rtifical [sic] restrictions on factual hearing[s] may bring about the following consequences: the criminal escapes public examination and self-scrutiny of his conduct; the victim and potential victim see criminal law as helpless to protect them; the potential criminal comes to look on the restraint of criminal law as ineffectual. The wrong lesson is

taught, and the inevitable sequel is encouragement of rational criminal intent, emotional criminal intent, and apparent profitability of crime. By reducing reliability of factual hearing, we erode criminal law's ability to protect through deterrence, and we foster the impression that criminal law is aimed more at the process of criminal prosecution than at crime itself." (P. 157.)

By reason of the foregoing, our analysis of criteria "a" leads us to conclude that the Truth-in-Evidence provision substantially enhances the reliability of the fact-finding process and points toward retroactive application.

Criteria (b) (reliance): A defendant's reliance on California's pre-Proposition 8 Exclusionary Rules of evidence is of no legal significance because the defendant possesses no vested right to the application of those rules. As previously discussed, the Exclusionary Rules of evidence were not devised for the express purpose of benefiting the defendant. Again the Exclusionary Rule in question was devised as a remedy to safeguard Fourth Amendment type rights through its deterrent effect on future unlawful police conduct, rather than a personal constitutional right of the party aggrieved. (United States v. Calandra, supra, 414 U.S. 338, 347, 348 [38 L.Ed.2d 561, 571].) The

rule focuses on police activity, not the defendant's activity.

(We cannot say that reliance on California's pre-Proposition 8 Exclusionary Rule at a pretrial suppression hearing would not entitle a defendant, or the People, as the case may be, under certain circumstances to have the matter remanded to the trial court for reconsideration solely in light of post-Proposition 8 federal law. In our opinion such action by a court of review would be appropriate if, and only if, the record on review shows that remand was necessary as a matter of basic fairness. Absent such a showing a reviewing court should decide the matter based solely on federal law in accordance with the

views expressed herein.)

Criteria (c) (effect on the adminstration of justice): The Exclusionary Rule has been subject to continuous criticism ever since its inception as a rule which benefits only criminals and is detrimental to an efficient and economical system of criminal justice. Increasing numbers of judges, lawyers, legal scholars and concerned citizens are questioning whether the Exclusionary Rule itself really accomplishes the purpose for which it was intended and whether our slavish adherence to the rule is worth the exorbitant cost it imposes on the criminal justice system by way of delay, expenditure of tax dollars and loss of public confidence in our courts by creating

an upside-down system which diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police.

Judge Malcolm Wilkey of the United States Court of Appeals, District of Columbia Circuit, claims that "the greatest obstacle to replacing the exclusionary rule with a rational process" (which he views as providing a direct remedy against the lawless police officer, but admitting the illegally seized evidence in a criminal case) is "the powerful, unthinking emotional attachment" to the rule by some lawyers and judges "heavily imbued with a mystique of the exclusionary rule as of almost divine origin."

In 1926, Justice Cardozo,

who then was a judge of the New York Court of Appeals, authored the unanimous opinion in People v. Defore (1926) 242 N.Y.13 [150 N.E. 585]. In that opinion Justice Cardozo coined the classic and oft quoted expression of protest against the Exclusionary Rule when he lamented the unfortunate consequence of its application. "The criminal is to go free because the constable has blundered." (Italics added.)

In 1954, Mr. Justice Jackson commented as follows in Irvine v. California (1954) 347 U.S. 128, 136-137 [98 L.Ed. 561, 571, 74 S.Ct. 381]: "That the rule of exclusion and reversal results in the escape of guilty persons is more capable of demonstration than that it deters

invasions of right by the police. The case is made, so far as the police are concerned, when they announce that they have arrested their man. Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one lawbreaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches. The disciplinary or educational effect of the court's releasing the defendant for police misbehavior is so indirect as to be

no more than a mild deterrent at best."

In 1971, Chief Justice Weintraub of the State of New Jersey in State v. Bisaccia, supra, 58 N.J. 586 [279 A.2d 675] stated: "Truth and justice are inseparable. A deliberately false judgment debases the judicial process, and no less so because the false judgment is an acquittal. On a motion to suppress we deal with evidence of guilt, and the purpose of the litigant is to conceal that evidence to the end that he will escape conviction notwithstanding his guilt. Hypothetically there could be some cases in which the evidence sought to be suppressed would falsely suggest guilt, but a judge would be short in

realism if he did not understand that the evidence he is asked to suppress is evidence of guilt and that the judgment of not guilty which will ensue will likely be false. To justify so serious an insult to the judicial process, some compensating gain should be incontestable.

"One cannot reasonably deny the need for some remedy for a breach of the Fourth Amendment guaranty against an unreasonable search and seizure. The question is whether suppression of the truth with the consequent acquittal of the guilty is a fair and an effective measure to that end. The ostensible reason for the rule is to assure compliance with the Fourth Amendment by barring the use of the fruits of a violation.

That suppression is effective in curtailing infractions of the Amendment is quite doubtful. See Oaks. 'Studying the Exclusionary Rule in Search and Seizure.' 37 U.Chi.L.Rev. 665 (1970). But if it were, the justice of the suppression doctrine would remain questionable as it was when Mapp was handed down, and even more so because of a decade of experience under that decision. The reasons are evident.

"The first right of the individual is to be protected from attack. That is why we have government, as the preamble to the Federal Constitution plainly says. In the words of Chicago v. Sturges, 222 U.S 313, 322, 32 S.Ct. 92, 93; 56 L.Ed. 215, 220 (1911); 'Primarily,

governments exist for the maintenance of social order. Hence it is that the obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded, may be regarded as lying at the very foundation of the social compact.'

"The Bill of Rights was not intended to deny that primary mission. That is not to belittle the inestimable rights thus consecreated [sic], but rather to say that those rights may not be read to defeat the very reason for government itself.

"We must be mindful that the contest is not between the State and the individual. The contest is wholly between competing right of the

individual - the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, Mapp denies the innocent the protection due them.

"But Mapp impairs the primary right of the individual to protection from crime in still other ways. The release of the guilty must blunt and breed contempt for the deterrent thrust of the criminal law. Moreover the case-by-case process of law-making in the application of

Mapp has left State officers quite at sea as to what is expected of them. The time-distance between the Supreme Court and the firing line is just too great and the case-by-case process too lumbering and too cumbersome to permit that Court to exercise effective and responsible management of the criminal business of the States. As a result, the State courts (and the federal bench as well) are drained of energy sorely needed for the trial of criminal and civil cases, as motions to suppress are piled upon motions, appeals upon appeals, and post-conviction proceedings upon post-conviction proceedings." (279 A.2d at pp. 676-677.)

In 1971 Chief Justice Warren

Burger of the United States Supreme Court spoke out forcefully critizing [sic] the Exclusionary Rule in his dissent in two cases decided the same day, namely Coolidge v. New Hampshire (1971) 403 U.S. 443 [29 L.Ed.2d 564, 91 S.Ct. 2022] and Bivens v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388 [29 L.Ed.2d 619, 91 S.Ct. 1999].

In Coolidge, the majority of the court reversed the conviction of the defendant, found guilty by a jury, for the murder of a 14-year-old girl in 1964 on the grounds that evidence in the form of vacuum sweepings from the defendant's car was obtained in violation of the Exclusionary Rule. The court said: "This case illustrates graphically

the monstrous price we pay for the Exclusionary Rule in which we seem to have imprisoned ourselves ...." (Id., at p. 493 [29 L.Ed.2d at p. 598].)

In his dissent in Bivens, referring to the majority holding in the Coolidge case, Chief Justice Burger said: "[I]t is hardly surprising that such results are viewed with incomprehension by nonlawyers in this country and lawyers, judges, and legal scholars the world over.

"Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass

on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing 'shoot to kill' with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a 'shoot' order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.[25]

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25 Chief Justice Burger by his tiger and mouse in a schoolroom parable has articulated the criticism directed at the inflexibility of the exclusionary rule. The rule is not enforced in degrees. Rather, it indiscriminately suppressed all illegally seized evidence without regard to its probative value and without regard to the set of factors

"I submit that society has at least as much right to expect rationally graded responses from judges in place of the universal 'capital punishment' we inflict on all evidence when police error is shown in its acquisition." (P. 419 [29 L.Ed.2d at p. 640].)

"We can and should be faulted for clinging to an unworkable and irrational concept of law." (P.

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which led to its seizure. Every unconstitutional search and seizure is treated exactly the same, regardless of the degree of the police violation from sanctioned conduct or the willfulness of the violation. It is this inflexibility which is critized [sic] as being unrealistic. Honest errors in judgment are treated as harshly as willful and malicious planned misconduct. Through this categorization of values the Supreme Court has seemingly placed a higher social value on protecting the Fourth Amendment than in protecting the community from criminals.

420 [29 L.Ed.2d at p. 640].)

In Bivens the Chief Justice lashed out at the Exclusionary Rule "as an anomalous and ineffective mechanism with which to regulate law enforcement." (Id. at p. 420 [29 L.Ed.2d at p. 640].) He observed that "[i]n a country that prides itself on innovation, inventive genius, and willingness to experiment, it is a paradox that we should cling for more than a half century to a legal mechanism that was poorly designed and never really worked...." (Id., at p. 424 [29 L.Ed.2d at p. 643]) and conclude that "[r]easonable and effective substitutes can be formulated...." (Id. at p. 421 [29 L.Ed.2d at p. 641].) He recommends that in lieu of

develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated...." (Id., at p. 422 [29 L.Ed.2d at p. 641].) "[I]ndeed there is nothing to prevent a State from enacting a comparable statutory scheme without waiting for the Congress. Steps along these lines would move our system toward more responsible law enforcement on the one hand and away from the irrational and drastic results of the suppression doctrine on the other...." (Id., at p. 424 [29 L.Ed.2d at pp. 642-643].)

In United States v. Calandra, supra, 414 U.S. 338,

evidence was seized illegally from the defendant, and at a subsequent grand jury investigation the defendant was asked questions based on the illegally seized evidence. Mr. Justice Powell delivering the opinion of the court held that the Exclusionary Rule is a judicially created remedy rather than a personal constitutional right of the party aggrieved. The extension of the rule to grand jury proceedings would unduly interfere with the effective discharge of the grand juries' function. Further, the court felt that appplication of the Exclusionary Rule to grand jury proceedings would not further the goal of deterrence of unlawful police activity. (Id., at pp. 342, 348 [4 L.Ed.2d at pp. 568,

571].)

The Calandra decision led Mr. Justice Brennan in the dissenting opinion to state that "The door is again ajar. As a consequence, I am left with the uneasy feeling that today's decision may signal that a marjority of my colleagues have positioned themselves to reopen the door still further and abandon altogether the Exclusionary Rule in search and seizure cases ...." (414 U.S. 338 at p. 365 [4 L.Ed.2d 561 at p. 581].)

Justice Macklin Fleming of the California Court of Appeal (retired) in his book Of Crimes and Rights (New York: W. W. Norton & Co., Inc., 1978) in discussing the susceptibility of our criminal law to

fragmentation of legal theory cites as a prime illustration our two views toward "illegally" obtained evidence.[2]

The older view, articulated by Jeremy Bentham and Professor John H. Wigmore, theorized that a

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2 Presumably Justice Fleming accented the word "illegally" because case law usually uses that word. Of course that word does not appear in the Fourth Amendment. The operative word is "unreasonable." The Fourth Amendment states in pertinent part that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, ..." (Italics added.)

Nor does the Fourth Amendment state that evidence obtained by an "unreasonable" search and seizure must be suppressed. The exclusionary rule of evidence, as previously noted, was a court created remedy for violation of the Fourth amendment rights which supposedly was to provide a deterrent effect against "illegal" (unreasonable) police activity.

violation of law should not go unpunished merely because a second violation of law had been committed in the course of investigating the first, or, as Justice Benjamin N. Cardozo put it, the murder should not go free because the constable blundered. Under this view all illegally obtained evidence was admissible. The opposite view (the prevailing Exclusionary Rule) that flatly prohibits any use of evidence obtained in violation is purely technical. The latter view theorized, in effect, it is better for a murderer to go free than for the state to take advantage of any illegal conduct on the part of its officers. (P. 23.) He observed that by our total adherence to the latter

view "[o]ur preoccupation with restrictions on police activity has become so great that an impression circulates that the chief end of criminal law is to prevent invasions by police rather than invasions by criminals. Unquestionably, this preoccupation had lead to the release of patently guilty criminals and thereby weakened the deterrent effect of criminal law...." (P. 23.) "[W]e have set fire to the house of criminal law in out attempt to roast the police pig...." (P. 156.)

In arguing for more effective factual inquiry, Justice Fleming starts "with the premise that reliability in criminal hearing requires full disclosure of all evidence relevant to the inquiry.

The only exception involves evidence who disclosure would produce a greater evil than might result from failure of proof in the inquiry." He cites as an example the case of United States v. Nixon (1974) 418 U.S. 683, 709 [41 L.Ed.2d 1039, 1064, 94 S.Ct. 3090], where the Supreme Court unanimously upheld the subpoena of presidential tape recordings and overruled the claim of executive privilege, saying: "[T]he twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.... The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a

partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all facts, within the framework of the rules of evidence." (P. 155.)

Justice Fleming points out that "[O]ur reaction to abuse of authority by criminal investigators and police has taken a curiously convoluted and byzantine turn. In suppressing evidence and undertaking to immunize judicial process against abuse, we have sought to turn back the clock and reconstruct events as though the evidence never existed. Thus, we suppress the incriminating letter, eyewitness identification, discovery of the murder weapon, even

discovery of the corpse, if those items of evidence are found to have been illegally obtained, and we solemnly conduct our factual hearing under the legal fiction that those events never happened. As so-called fruit of the poisonous tree, we erase entire chains of events by pretending they never took place." (Pp. 155-156.)

Justice Fleming has previously argued that the primary remedy for unreasonable official conduct is not suppression of evidence, but discipline of the officer. Illegally obtained evidence should be used in criminal prosecutions, except when its illegality is so flagrant that its use would condone a greater crime

than the one under prosecution. He suggests that in the interest of sound judicial administration we should change our rules for suppression of illegally obtained evidence from compulsory suppression to the carefully limited discretionary suppression that prevails in England. (See: Fleming, The Price of Perfect Justice (New York: Basic Books, 1974) pp.121-128.)

The English, based on centuries of experience, have coined a saying that "Not only must justice be done, but it must appear to have

been done."[27] This pays close attention to the public's concerns and attitudes. Chief Justice Burger said the same thing when he said: "The public image of justice, like justice itself, is indivisible. The public does not distinguish between federal and state courts and is not concerned with the details or interested in excuses.... They are paying the bills for both systems, and they want results.... What the public thinks ... becomes the measure of public confidence in the courts, and that confidence is indispensable."

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27 "... a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (Rex v. Sussex Justices (1924) 1 K.B. 256, 259 (per Lord Hewart).)

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The Exclusionary Rule violates both requirements of the English saying mentioned above. The purpose of a trial is a search for truth. The Exclusionary Rule, by suppressing relevant evidence, suppresses the truth and prostitutes our concept of justice by freeing guilty criminals. "Justice dictates not only that the innocent go free, but that the guilty be punished for his crimes."

The "drastic results" of the Exclusionary Rule on the criminal justice system referred to by Chief Justice Burger including the unacceptable delay and exhorbitant cost come into clear focus when considered in light of the alarming statistics supplied by the FBI Crim Index on criminal activity in California.

The FBI Crime Index report[28] reflects

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[28]See "Criminal Justice Profile--1980," "Statewide," a Supplement to Crime and

"footnote continued"

the increase in the numbers of the seven major felony offenses committed in California by comparing calendar year 1971 with calendar year 1980. Those statistics are as follows:

Crimes Against Persons	1971	1980
Willful Homicide	1,633	3,405
Forcible Rape	7,281	13,661
Armed Robbery	47,447	90,282
Aggravated Assault	48,098	102,555
Crimes Against Property:		
Burglary	391,157	543,846
Felony Theft	75,128	264,192
Motor Vehicle Theft	143,911	174,548
TOTAL	714,685	1,192,489

"footnote 28 continued:

Delinquency Publications, prepared by State of California, Department of Justice, Division of Law Enforcement, Bureau of Criminal Statistics and Special Services, George Deukmejian, Attorney General; Michael Franchetti, Chief Depty Attorney General; William J. Anthony, Director, Division of Law Enforcemtnt; Fred H. Wynbrandt, Assistant Director, Criminal Identification and Information Branch; R. James Rasmussen, Chief, Bureau of Criminal Statics and Special Services.

During the 10-year period of 1971 through 1980 the FBI Crime Index shows total number of the 7 major felony offenses and clearances[29] reported by California law enforcement agencies to be as follows:

Crimes Against Persons:	10-year Period 1971 through 1980
Wilful Homicide	23,092
Forcible Rape	98,404
Armed Robbery	613,514
Aggravated Assault	717,226
Crimes Against Property:	
Burglary	4,550,111
Felony Theft	1,454,435
Motor Vehicle Theft	1,457,590
TOTAL	8,914,372

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[29]CLEARANCE: An offense is cleared or "solved" for crime reporting purposes when at least one person is arrested, charged with the commission of the offense, and turned over to the court for prosecution or cited to juvenile authorities. In certain situations a clearance may be counted by "exceptional" means when the police definitely know the identity of the offender, have enough information to support an arrest and know the location of the offender but for some reason cannot take the offender into custody.

The FBI Crime Index also shows that 110,569 adults were arrested in California during 1980 for felony and misdemeanor drug law violations. During the same year juvenile arrests for robbery (7,354), burglary (36,814), and drug law violations (7,419), totalled 51,587.

For the 10-year period 1971 through 1980 adult felony and misdemeanor offenses and clearances for drug law violations totalled 1,111,195. During the same 10-year period, juvenile felony and misdemeanor drug law violations totalled 315,181. Total drug law violations 1971 through 1980--1,426,376. The above statistics support Attorney George Deukmejian's statement in the Voters Pamphlet in support of Proposition 8 that "Crime has increased to an absolutely intolerable level."

The instant case is a classic example of how the Exclusionary Rule causes delay and waste of public funds. Here, since defendant Wilson was charged on April 30,

1981, for possession of cocaine and hashish oil--over a year ago--criminal justice proceedings have been solely directed at a trial of Officer Kaiser who in the line of duty merely walked up to the defendant and asked for "a minute of his time." This in light of the defendant's admission at his suppression hearing that the stash of cocaine and hashish oil in his attache case was for his personal use. (See fn. 4, ante.)

The total damage inflicted by the Exclusionary Rule on the criminal justice system by allowing the guilty to escape punishment, through its contribution to unacceptable delay, exhorbitant costs, and the great loss of the public's confidence in their criminal justice system is mind boggling.

Aside from property stolen in burglaries and robberies, a large proportion of which were undoubtedly committed to

support a drug habit, the costs to the system are astronomical in light of the great numbers of criminal offenses involving the possession and possession for sale of narcotics and dangerous drugs. If the narcotics are suppressed, the guilty often walk free because it is the only evidence to convict.

Furthermore, if the narcotics' evidence is not suppressed and the defendant pleads guilty under section 1538.5, subdivision (m) he is still entitled to an appeal from the denial of his motion to suppress. Moreover, the California State Supreme Court held in People v. Hill (1974) 12 Cal.3d 731 [117 Cal. Rptr. 393, 528 P.2d 1] that the harmless error doctrine of review is inapplicable on appeal from a guilty plea entered following an erroneous denial of a motion to suppress evidence.

Undoubtedly many motions to suppress which have little or no merit are made by

defense counsel for fear of being accused of being ineffective counsel. This unnecessarily burns up additional trial and appellate court time. Motions to suppress evidence pursuant to the Exclusionary Rule result in a monstrous waste of judicial resources and public funds.[30]

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[30]A vast majority of persons charged with criminal offenses in California are supplied free defense counsel at public expense.

In Los Angeles County alone the total cost to the taxpayers to supply public defenders and court-appointed attorneys to represent adults and juveniles charged with crimes in the superior court increased from $16,138,080 in fiscal year (FY) 1977-1978 to $24,419,974 in FY 1982-1983 (proposed budget). The total expenditure of public funds for counsel to represent defendants charged with crimes in the superior court in Los Angeles County for the six years from FY 1977-1978 through FY 1982-1983 (proposed budget) is $118,365,419 for all appointed counsel.

Moreover, all defendants convicted of felonies in the superior court are afforded free clerks' and reporters' transcripts at public expense. The costs to Los Angeles County taxpayers for these transcripts increased from $851,664 in FY 1977-1978 to $1,541,416 in FY 1982-1983 (proposed budget). The total expenditure of public funds in Los Angeles County for these transcripts during the six-year period from FY 1977-1978 through

"footnote continued"

The ramifications of the restrictive effect of the Exclusionary Rule on law enforcement efforts to stamp out the narcotic and dangerous drug epidemic nightmare

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"footnote 30 continued"

FY 1982-1983 (proposed budget) is $7,129,391.

Thus, the total sum expended by Los Angeles County taxpayers for trial defense counsel in the superior court and for clerks' and reporters' transcripts during the six-year FY 1977-1978 through FY 1982-1983 (proposed budget) is $125,494,810.*

A rough statewide expenditure of public funds for trial defense counsel in the superior court and for clerks' and reporters' transcripts during the six-year period FY 1977-1978 through FY 1982-1983 can be extrapolated from the ratio of the population of Los Angeles County to the total state population. Los Angeles County's population represents about one-third of the total state population. Accordingly it is estimated that roughly $376 million of public funds have been expended statewide for the purposes described during the six-year period mentioned above.

In addition, on the appellate level, the total cost to the taxpayers statewide to supply state public defenders and court-appointed counsel on appeal increased from $5,251,718 in FY 1977-1978 to $10,756,134 in FY 1982-1983 (proposed budget). The total expenditure of public funds for counsel to represent defendants on appeal statewide during the six-year period, FY 1977-1978

"footnote continued"

engulfing our society are of particular significance. In narcotics cases the contraband itself is often the only evidence

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"footnote 30 continued"

through FY 1982-1983 (proposed budget), is $47,286,402.†

Thus, approximately $423 million of public funds will have been expended statewide for trial and appellate counsel and clerks' and reporters' transcripts during the six-year period (FY 1977-1978 through F FY 1982-1983 (proposed budget).

A substantial portion of the above millions of dollars were undoubtedly expended on motions to suppress evidence in the trial court and on review on the appellate level. Not included in the above figures are the costs in millions to the taxpayers in support of the court time expended in hearing motions to suppress. Nor included in the above figures are the costs to the public for the deputy district attorneys, the deputy attorneys general, and police officers who are taken from their duties to testify on defendants' motions to suppress evidence.

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*Los Angeles County expenditure figures condensed from statistics supplied by Harry L. Hufford, Chief Administrative Officer, County of Los Angeles.

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†State expenditure figures condensed from statistics supplied by Geri Brown, Budget Officer, Judicial Council of California, Administrative Office of the Courts.

to convict and, if it is suppressed after the granting of a defendant's motion to suppress, the defendant walks free of punishment or treatment. The proportion of the crimes of robbery, burglary, and theft reported in the FBI Crime Index committed to support a drug habit is unknown. However, an in-depth study by Dr. Eric D. Wish, a narcotic and drug research scientist, reported to the Subcommittee on Crime, United States House of Representatives, on June 18, 1981, showed some startling statistics on the relationship between drug use and crimes committed to provide money for buying drugs. Of particular significance is the finding in Dr. Wish's study concerning the types and numbers of criminal offenses of which drug users are charged as compared to nonusers. The study showed that drug user arrestees' arrest rates for drug offenses, larcenies, burglaries, and robberies ranged from two to three times

those of nonuser arrestees.[31]

In view of the foregoing, we conclude that THE IRRATIONAL AND UNWORKABLE EXCLUSIONARY RULE IS A COSTLY FAILURE AND AS DESTRUCTIVE TO CALIFORNIA'S CRIMINAL JUSTICE SYSTEM AS THE MEDFLY IS TO CALIFORNIA'S FARM INDUSTRY.

The efficient administration of justice (criteria (c)) requires the prompt delivery of justice at the lowest possible cost. The efficiency of California's criminal justice system was enhanced by passage of the Truth-in-Evidence provision in Proposition 8 to the extent that the provision eradicated the

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[31]Statements by Tom Vischi, an economist with the federal Alcohol, Drug Abuse and Mental Health Administration, and David Hoover, Public Information Officer for the federal Drug Enforcement Administration, indicate that illegal drug trafficking in the United States is robbing the economy of an estimated $100 billion a year and contributes to inflated consumer prices, unemployment, and higher taxes. In short drug viola-

"footnote continued"

exclusionary rule under state law. The application of the rule under state law was more complex and more restrictive than under federal law. The federal rule is simpler to apply and less restrictive of law enforcement officers.

(It's time to close the book on the Exclusionary Rule. To our knowledge the United States is the only nation in the world which mechanically excludes relevant and competent evidence as to the guilt or innocence of the accused because of the manner in which the evidence may have been obtained.

The Truth-in-Evidence provision may well serve as a catalyst for the eventual complete eradication of the exclusionary rule on the

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"footnote 31 continued"

tion crimes are not so-styled victimless crimes. There is no such thing as a victimless crime. Society is the victim.

federal level with the rule being replaced with a constructive alternative which can serve as a remedy for Fourth Amendment violations by law enforcement officers, possibly along the lines proposed by Chief Justice Burger in Bivens, supra, or Justice Fleming, supra.)

C. Does the proscription against ex post facto laws preclude application of the Truth-in-Evidence provision? No.

In People v. Snipe (1972) 25 Cal.App. 3d 742 [102 Cal.Rptr. 6, 60 A.L.R.3d 1316], the court stated at pages 746-747: "An ex post facto law is a retrospective law applying to offenses committed before its enactment which by its necessary operation and in its relation to the offense, or its consequences, changes the situation of the defendant to his detriment. (Thompson v. Utah, 170 U.S. 343, 351-352 [42 L.Ed.2d 1061,

1066-1067, 18 S.Ct. 620]; DeWoody v. Superior Court, 8 Cal.App.3d 52, 55 [87 Cal. Rptr. 210]; People v. Ward, supra, 50 Cal.2d 702, 707 [328 P.2d 777].) Constitutional limitations, therefore, are transgressed by retroactive procedural changes if they operate to deny the accused a vested defense or if they affect him in a harsh or arbitrary manner. (Kring v. Missouri, 107 U.S. 221 [27 L.Ed 506, 2 S.Ct. 443].) As the United States Supreme Court pointed out in Beazell v. Ohio, 269 U.S. 167, 171 [70 L.Ed. 216, 218, 46 S.Ct. 68], the distinction between a procedural change which transgresses the Constitution if given a retroactive application and one which does not is a matter of degree, and each case must be decided on its own facts."

In People v. Sobiek (1973) 30 Cal.App. 3d 458 at page 473 [106 Cal.Rptr. 519, 82

A.L.R.3d 804], the following were given as examples of procedural changes which were held not to violate the ex post facto rule: "(a) permitting comment by the court; (b) formerly incompetent witnesses made competent to testify; (c) granting new rights of appeal to the state; (d) changes in the statute of limitations; (e) reception of previously inadmissible evidence; (f) permitting refixing of sentences; (g) extending time to pronounce judgment; (h) eliminating one of the grounds for quashing an indictment." (Italics added.)

(13) Deciding the case at bench "on its own facts," we conclude that defendant Wilson would not be denied a "vested defense" since he possessed no "vested right" to application of the pre-Proposition 8 state

Exclusionary Rule in the first instance. (See discussion supra and fn. 32 below.)[32]

Nor would applying the Truth-in-Evidence provision affect the defendant in a "harsh or arbitrary manner." As previously discussed, the Exclusionary Rule's purpose is to deter future "illegal" (unreasonable) police activity. It's focus was not on the defendant's activity. The Truth-in-Evidence provision in no way changed or altered to the defendant's detriment the requisite elements of the crime for which he is charged.

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[32]In Cooley's Constitutional Limitations (7th ed. 1903) at page 524, it is stated: "It must also be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens. . . . Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature; and the changes which are enacted may lawfully

"footnote continued"

There is no showing that the Truth-in-Evidence provision will operate to preclude the defendant from presenting all relevant evidence in defense of the charge to the trier of fact. As noted the federal Exclusionary Rule is still in effect.

Accordingly, we hold that since application of changes in rules of evidence by legislation do not infringe on constitutional ex post facto guarantees (Thompson v. Missouri (1898) 171 U.S. 380 [43 L.Ed.204, 18 S.Ct. 922]), obviously such changes through a constitutional amendment by initiative would not violate those constitutional

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"footnote 32 continued"

be made applicable to existing causes of action, even in those states in which retrospective laws are forbidden. For the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it could not therefore be called retrospective even though some of the controversies upon which it may act were in progress before."

guarantees. The People reserve the right to make their own laws and alter them when wisdom gathered by experience indicates that change is warranted. (People v. Hickman (1928) 204 Cal. 470, 479 [268 P. 909].)

D. Is the defendant denied due process and equal protection of the laws by reason of retroactive application of the Truth-in-Evidence provision? No.

(14a) Defendant Wilson's contention that application of the Truth-in-Evidence provision of this case prior to the effective date of the proposition, June 9, 1982, violates his right to due process or equal protection of the law is without merit.

The People of the state by virtue of article II, section 8, subdivision (a) of the California Constitution have been granted the power " . . . to propose statutes and amendments to the Constitution and to adopt or reject them."

In Luria v. United States (1913) 231 U.S. 9, 26-27 [58 L.Ed. 101, 106-107, 34 S.Ct. 10], the court said: "'If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'"

In People v. Hickman, supra, 204 Cal. 470, the court said at pages 478-479: "A state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal constitution. It is not tied

down by any provision of the federal constitution to the practice and procedure which existed at common law. Subject to the limitations noted, it may avail itself of the wisdom gathered by experience to make such changes as may be necessary." (Citation omitted.)

The Hickman court also observed that: "As used therein the term 'due process' refers to the law of the land which derives its authority from the inherent and reserved powers of the states, exercised within the limitations of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, the greatest security of which resides in the right of the people to make their own laws and alter them at pleasure. It does not follow that merely because something has been the actual law of the land from time out of mind, it is therefore 'due

process.' (Hurtado v. California, 110 U.S. 516, 529).)" (Id., at p. 479.)

The Fourteenth Amendment to the federal Constitution in pertinent part provides: " . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

By judicial analysis, on both the federal and state levels, in a myriad of cases raising the "equal protection" clause, the following broad principles of its application have evolved. Legislation must be "general" in its terms and application; "special" legislation is prohibited. Although not easy to define, a law is said to be "general" when it relates to and operates uniformly upon the whole of a validly selected single class of persons similarly circumstanced. A validly selected class is

one in which there is a reasonable classification of persons for legitimate legislative purposes founded on a reasonable and rational basis as to matters which possess some natural or intrinsic or constitutional distinction as to justify and requre special treatment.

(15) A law may be said to be "special" if it confers particular privileges or imposes peculiar disabilities or burdensome conditions, in the exercise of common right, on a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. (Serve Yourself Gas etc. Assn. v. Brook (1959) 39 Cal.2d 813 [249 P.2d 545]; 11 Cal. Jur.2d Constitutional Law, §§ 258-264; 3 Witkin, Summary of Cal. Law (7th ed. 1960) Constitutional Law, §§ 125, 129, 130; 16A C.J.S., Constitutional Law, § 505.)

Case law has developed a two-level standard in evaluating legislative classification under the "equal protection" clause. The traditional test is that there is a presumption of constitutionality which will not be overthrown by the courts unless it is palpably arbitrary and beyond rational and reasonable doubt erroneous and no set of facts reasonably can be conceived that would sustain it. This traditional test is usually applied to "economic" regulations. The other, and stricter, standard is employed in cases involving "suspect classifications" or "fundamental interests." Here the courts take a close look at the classification and require not only a compelling state interest which justifies the law, but also that the distinctions drawn by the law are necessary to further its purpose. (In re Antazo (1970) 3 Cal.3d 100 [89 Cal.Rptr. 255, 473

P.2d 999]; California State Employees' Assn. v. Flournoy (1973) 32 Cal.App.3d 219 [108 Cal. Rptr. 251].)

(14b) Here, it would be academic to analyze whether the Truth-in-Evidence provision falls in the category of "economic" or "fundamental interest," or hybrid, and which standard would apply. We hold that, applying the stricter standard, the Truth-in-Evidence provision is "general" in character, that the class was validly selected, operates uniformly and does not violate the "equal protection" clause. (See Alex v. County of Los Angeles (1973) 35 Cal.App.3d 994, 1000, 1001 [111 Cal.Rptr. 285].)

The People of the State of California have by virtue of their reserved power altered the existing law of California in order to provide greater protection for themselves and the victims of crime by act-

ing to amend the Constitution of the state. The fact that this change may affect cases pending before a reviewing court by permitting the admission of additional, relevant evidence, in the trial court, does not operate to deprive the defendant of any rights under the due process or equal protection clauses. Each state is free to establish its own mode of judicial procedure.

In summary, by reason of the plain language of the Truth-in-Evidence provision itself coupled with our conclusions (1) that the provision substantially enhances the reliability of the fact-finding process (criteria (a), supra); (2) that the defendant has no vested right to application of California's pre-Proposition 8 exclusionary rule (criteria (b), supra); and (3) that applying the rule retroactively would have

a beneficial effect on the administration of California's criminal justice system (criteria (c), supra), we hold that the Truth-in-Evidence provision of Proposition 8 should be applied retroactively.

We further hold that defendant's constitutional right against ex post facto laws has not been violated nor has his right to due process or equal protection of the laws been abridged.

IV

THE CASE AT BENCH

Having concluded that Proposition 8 is constitutional on its face and that the Truth-in-Evidence provision (§ 28, subd. (d)), which abrogates section 1538.5 and California decisional law imposing higher standards for searches and seizures than under federal law has retroactive effect, we turn to federal case law to resolve the detention issue.

The language in the United States Supreme Court case of United States v. Mendenhall (1980) 446 U.S. 544 [64 L.Ed.2d 497, 100 S.Ct. 1870] pertaining to the "detention" issue is dispositive of the instant case. The California cases of People v. Bower, supra, 24 Cal.3d 638 and In re Tony C., supra, 21 Cal.3d 888, have been rendered inapplicable for resolution

of the detention issue by reason of the passage of Proposition 8 in June 1982 and the fact that the 1979 Bower and the 1978 In re Tony C. opinions did not consider the United States Supreme Court's 1980 Mendenhall decision. As stated by Mr. Justice Powell in his concurring opinion, joined by the Chief Justice and Mr. Justice Blackmun, in Reid v. Georgia (1980) 448 U.S. 438 at page 443 [65 L.Ed.2d 890, 896, 100 S.Ct. 2752]: "We ... do not consider the initial seizure question, that issue remains open for consideration by the state courts in light of the opinions in Mendenhall."

Pertinent and instructive here is the language in Mendenhall discussing the distinction between an intrusion amounting to a "seizure" (detention) of the person and an "encounter" which intrudes on no

Fourth Amendment rights against an unreasonable seizure.[33]

We first quote from the lead opinion by Mr. Justice Stewart joined by Mr.

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[33]The Mendenhall case involved a defendant who arrived at the Detroit Metropolitan Airport on a flight from Los Angeles who was initially approached and questioned by two drug enforcement administration (DEA) agents. Defendant Mendenhall was subsequently arrested for possessing heroin. The district court had denied the defense motion to suppress, concluding (a) that the DEA agents' conduct in initially approaching the defendant and asking to see her ticket and identification was a permissible investigative stop, based on facts justifying a suspicion of criminal activity, and (b) that the defendant had accompanied the agents to the DEA office voluntarily and voluntarily consented to a body search in the DEA office. Defendant Mendenhall's subsequent conviction after a trial was reversed by the Court of Appeals which found that the defendant had not validly consented to the search.

The United States Supreme Court in Mendenhall reversed the judgment of the court of appeals and concluded that the district court's determination that defendant Mendenhall consented to the search of her person "freely and voluntarily" was sustained by the evidence.

Justice Rehnquist: "The Fourth Amendment's requirement that searches and seizures be founded upon an objective justification, governs all seizures of the person, 'including seizures that involve only a brief detention short of traditional arrest. Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1, 16-19 (1968).' United States v. Brignoni-Ponce, 422 U.S., at 878. Accordingly, if the respondent was 'seized' when the DEA agents approached her on the concourse and asked questions of her, the agents' conduct in doing so was constitutional only if they reasonably suspected the respondent of wrongdoing. But '[o]bviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way

restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' Terry v. Ohio, 392 U.S., at 19, n. 16." (464 U.S. at p. 551 [64 L.Ed.2d at p. 507].)[34]

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[34]The court further observed: "The distinction between an intrusion amounting to a 'seizure' of the person and an encounter that intrudes upon no constitutionally protected interest is illustrated by the facts of Terry v. Ohio, which the Court recounted as follows: 'Officer McFadden approached the three men, identified himself as a police officer and asked for their names. ... When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing.' Id., at 6-7. Obviously the officer 'seized' Terry and subjected him to a 'search' when he took hold of him, spun him around, and patted down the outer surfaces of his clothing, Id., at 19. What was not determined in that case, however, was that a seizure had taken place before the officer physically restrained Terry for purposes of searching his person for weapons. The Court 'assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred.' Id., at 19, n. 16. The Court's

"footnote 34 continued"

"We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display

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"footnote 34 continued"

assumption appears entirely correct in view of the fact, noted in the concurring opinion of MR. JUSTICE WHITE, that '[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets,' id., at 34. Police officers enjoy 'the liberty (again, possessed by every citizen) to address questions to other persons,' id., at 31, 32-33 (Harlan, J., concurring), although 'ordinarily the person addressed has an equal right to ignore his interrogators and walk away.' Ibid. [¶] Similarly, the Court in Sibron v. New York, 392 U.S. 40, a case decided the same day as Terry v. Ohio, indicated that not every encounter between a police officer and a citizen is

of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. See Terry v. Ohio, supra, at 19, n. 16; Dunaway v. New York, 442 U.S. 200, 207, and n. 6; 3 W. LaFave, Search and Seizure 53-55 (1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the

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"footnote 34 continued"

an intrusion requiring an objective justification. In that case, a police officer, before conducting what was later found to have been an unlawful search, approached Sibron in a restaurant and told him to come outside, which Sibron did. The Court had no occasion to decide whether there was a 'seizure' of Sibron inside the restaurant antecedent to the seizure that accompanied the search. The record was 'barren of any indication whether Sibron accompanied [the officer] outside in submission to show of force or authority which left him no choice, or whether he went voluntarily

"footnote 34 continued"

police cannot, as a matter of law, amount to a seizure of that person. [¶] On the facts of this case, no 'seizure' of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her

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"footnote 34 continued"

in a spirit of apparent cooperation with the officer's investigation.' 392 U.S., at 63 (emphasis added). Plainly, in the latter event, there was no seizure until the police officer in some way demonstrably curtailed Sibron's liberty. [¶] We adhere to the view that a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.' United States v. Martinez-Fuerte,

"footnote 34 continued"

and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct, without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See Terry v. Ohio, 392 U.S., at 31, 32-33 (Harlan, J., concurring). See also ALI, Model Code of Pre-Arraignment Procedure § 110.1(1) and commentary, at 257-261 (1975). In short,

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"footnote 34 continued"

428 U.S. 543, 554. As long as the person to whom questions are put remains free to disregard the questions and walk away,

"footnote 34 continued"

nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agents' initial approach to her was not a seizure. [¶] Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses does not depend upon her having been so informed.

"footnote 34 continued"

there has been no intrusion upon that person's privacy as would under the Constitution require some particularized and objective justification. [¶] Moreover, characterizing every street encounter between a citizen and the police as a 'seizure,' while not enhancing any interest secured by the Fourth Amendment, would impose wholly

"footnote 34 continued"

See Schneckloth v. Bustamonte, supra. We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions. It may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is whether it was made voluntarily." (446 U.S. at p. 554 [64 L.Ed.2d at p. 509].)

"footnote 34 continued"

unrealistic restrictions upon a wide variety of legitimate law enforcement practices. The Court has on other occasions referred to the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws. 'Without such investigation, those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved. In short, the security of all would be diminished. Haynes v. Washington, 373 U.S. 503, 515.' Schneckloth v. Bustamonte, 412 U.S., at 225." (446 U.S. at p. 552 [64 L.Ed.2d at p. 508].)

(Italics added.)[35]

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[35]Of interest is Mr. Justice Powell's separate opinion in Mendenhall joined by the Chief Justice and Mr. Justice Blackmun concurring in part and concurring in the judgment. This opinion did not reach the government's contention that the DEA agents did not "seize" the defendant within the meaning of the Fourth Amendment. Mr. Justice Powell assumed for the purpose of his opinion that the stop did constitute a "seizure" and held--as did the district court--that the federal agents had reasonable suspicion that the defendant was engaging in criminal activity, and, therefore, that they did not violate the Fourth Amendment by stopping the defendant for routine questioning.

The separate opinion of Mr. Justice Powell stresses the compelling interest in detecting those who would traffic in deadly drugs which flow through airports and the necessity that courts in applying the test of "reasonableness" need not ignore the expertise of law enforcement officials gained from special training and experience in stemming that flow.

We quote at length from Mr. Justice Powell's opinion, pages 561 through 565 [64 L.Ed.2d, pages 514 through 517]: "Terry v. Ohio, 392 U.S. 1 (1968), establishes that a reasonable investigative stop does not offend the Fourth Amendment. The reasonableness of a stop turns on the

"footnote 35 continued"

The recent case of United States of America v. Beale (9th Cir. 1982) 674 F.2d

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"footnote 35 continued"

facts and circumstances of each case. In particular, the Court has emphasized (i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise. See Brown v. Texas, 443 U.S. 47, 50-51 (1979); Delaware v. Prouse, 440 U.S. 648, 654-655 (1979); United States v. Brignoni-Ponce, 442 U.S. 873, 879-883 (1975); Terry v. Ohio, supra, at 20-22. [¶] The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement. [¶] To meet this pressing concern, the Drug Enforcement Administration since 1974 has assigned highly skilled agents to the Detroit Airport as part of a nation wide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States. Federal agents have developed 'drug courier

"footnote 35 continued"

1327 is relevant.[36] The Beale court held that the initial encounter by the police

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"footnote 35 continued"

profiles,' that describe the characteristics generally associated with narcotics traffickers. For example, because the Drug Enforcement Administration believes that most drugs enter Detroit from one of four 'source' cities (Los Angeles, San Diego, Miami, or New York), agents pay particular attention to passengers who arrive from those places. See United States v. Van Lewis, 409 F.Supp. 535, 538 (ED Mich. 1976), aff'd, 556 F.2d 385 (CA6 1977). During the first 18 months of the program, agents watching the Detroit Airport searched 141 persons in 96 encounters. They found controlled substances in 77 of the encounters and arrested 122 persons. 409 F.Supp., at 539. When two of these agents stopped the respondent in February 1976, they were carrying out a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution. [¶] Our cases demonstrate that 'the scope of [a] particular intrusion, in light of all the exigencies of the case, [is] a central element in the analysis of reasonableness.' Terry v. Ohio, supra, at 18,

"footnote 35 continued"

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[36]The Beale case involved an initial contact by a police officer with defendant Beale and a male companion at an airport

"footnote 3 continued"

in Fort Lauderdale was not a seizure or detention under the Fourth Amendment.

There a detective of the county sheriff's

"footnote 35 continued"

n. 15. The intrusion in this case was quite modest. Two plainclothes agents approached the respondent as she walked through a public area. The respondent was near airline employees from whom she could have sought aid had she been accosted by strangers. The agents identified themselves and asked to see some identification. One officer asked respondent why her airline ticket and her driver's license bor different names. The agent also inquired how long the respondent had been in California. Unlike the petitioner in Terry, supra, at 7, the respondent was not physically restrained. The agents did not display weapons. The questioning was brief. In these circumstances, the respondent could not reasonably have felt frightened or isolated from assistance. [¶] In reviewing the factors that led the agents to stop and question the respondent, it is important to recall that a trained law enforcement agent may be 'able to perceive

"footnote 35 continued"

"footnote 36 continued"

in Fort Lauderdale, Flordia, which culminated in Beale's apprehension and conviction of possession with intent to

"footnote 36 continued"

department assigned to the Fort Lauderdale

Airport detail suspicious of Beale's

"footnote 35 continued"

and articulate meaning in given conduct which would be wholly innocent to the untrained observer.' Brown v. Texas, supra, at 52, n. 2. Among the circumstances that can give rise to reasonable suspicion are the agent's knowledge of the methods used in recent criminal activity and the characteristics of persons engaged in such illegal practices. Law enforcement officers may rely on the 'characteristics of the area,' and the behavior of a suspect who appears to be evading police contact. United States v. Brignoni-Ponce, 422 U.S., at 884-885. 'In all situations the officer is entitled to assess the facts in light of his experience.' id., at 885. [¶] ... [¶] The District Court, which had an opportunity to hear Agent Anderson's testimony and judge his credibility, concluded that the decision to stop the respondent was reasonable, I agree. The public interest in preventing drug traffic is great, and the intrusion upon respondent's privacy was

"footnote 35 continued"

"footnote 36 continued"

distribute and conspiracy to possess with intent to distribute cocaine (in violation of 21 U.S.C. §§ 841(a)(1), in San Diego. The issues presented were the constitutional propriety of police encounters with

"footnote 36 continued"

behavior approached Beale and a male companion, identified himself, explained that

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"footnote 35 continued"

minimal. The specially trained agents acted pursuant to a well-planned, and effective, federal law enforcement program. They observed respondent engaging in conduct that they reasonably associated with criminal activity. Furthermore, the events occurred in an airport known to be frequented by drug couriers. In light of all the circumstances, I would hold that the agents possessed reasonable and articulable suspicion of criminal activity when they stopped the respondent in a public place and asked her for identification. [¶] The jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures. In applying a test of 'reasonableness,' courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience. The careful and commendable police work that led to the criminal conviction at issue in this case satisfies the requirements of the Fourth Amendment." (Fns. omitted.)

"footnote 36 continued"

defendant Beale in the Fort Lauderdale Airport, the use of a trained canine "Nick" to sniff Beal's luggage in the baggage room in Fort Lauderdale, and his ultimate arrest and the search of baggage in San Diego.

"footnote 36 continued"

they were not under arrest, and requested that they answer a few questions and produce identification. The court stated at pages 1329-1330: "Beale contends that the officer's initial approach and non-custodial questioning of him and his companion constituted a 'seizure' or detention under the Fourth Amendment, requiring founded suspicion or probable cause. The District Court, however, concluded otherwise and we agree. The suspects' mobility was not impaired; the situation was non-coercive;.

"footnote 36 continued"

The three-member panel of the Beale court vacated the defendant's conviction on the ground that "the use of a canine's keen sense of smell to detect the presence of contraband in personal luggage is a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's "founded" or "articulable" suspicion rather than "probable cause." The case was remanded to the district court for a factual or legal determination with regard to the Fort Lauderdale quantum of suspicion.

Berks did not request that they follow him or otherwise alter their destination, schedule, or location; the questions were routine and brief, and in an atmosphere not dominated by law enforcement personnel; and the suspects agreed to answer Berks' queries 'in a spirit of apparent cooperation.' See Sibron v. New York, 392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968); United States v. Fry, 622 F.2d 1218, 1219-21 (5th Cir. 1980) (per curiam); United States v. Elmore, 595 F.2d 1036, 1041-42 (5th Cir. 1979), cert. denied, 447 U.S. 910, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980); 3 W. La Fave, Search and Seizure: A Treatise on the Fourth Amendment 48-55 (1978). [¶] Thus, we need not consider whether 'founded' or 'articulable' suspicion existed at that time. Cf. United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d

497 (1980); Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968); United States v. Corbin, 662 F.2d 1066, 1068-71 (4th Cir. 1981.)"

In the case at bench defense counsel argues that the United States Supreme Court case of Reid v. Georgia, supra, 448 U.S. 438 controls. We disagree. The Reid case is markedly distinguishable from the case at bench factually and procedurally. Moreover the language in the opinion of Mr. Justice Rehnquist (dis.) and Mr. Justice Powell (conc.) joined by the Chief Justice and Mr. Justice Blackmun construing the limited ambit of Reid in light of Mendenhall renders Reid inapplicable.[37]

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[37]In Reid cocaine was found in a bag the defendant had abandoned at the Atlanta

"footnote 37 continued"

(16) Turning to the case at bench, having considered the United States Supreme Court cases of Terry, Mendenhall and Reid, and the Ninth Circuit case of Beale, we conclude that the record amply supports the trial court's finding. It is also our independent finding (People v. Leyba, supra, 29 Cal.3d 591) that Officer Kaiser's initial contact with defendant Wilson was not a sufficient intrusion into the defendant's life to rise to the level which would put into effect the rules governing a detention and that defendant Wilson's motion to suppress as evidence the cocaine and hashish oil was properly denied.

"footnote 37 continued"

Airport when he started to run away, after a federal narcotics agent asked him for identification and after he had consented to a search of his person and shoulder bag. The Georgia trial court granted the defendant's motion to suppress. The Georgia

"footnote 37 continued"

Here, Officer Kaiser dressed in casual civilian attire merely approached defendant Wilson in broad daylight in a public place at the curb in front of the Los Angeles International Airport, displayed his identification, and asked the defendant "If [he] might have a minute of his time" to which the defendant unhesitatingly said "Sure." There was no order to stop, no temporary restraint, no holding in custody, no physical restraint, no display of weapons, no threat of force or assertion of authority, and no pat down or putting on of hands.

"footnote 37 continued"

Court of Appeals reversed, holding that the stop of the defendant was permissible since he appeared to the agent to fit the so-called "drug courier profile."

The United States Supreme Court in granting certiorari in a short per curiam type opinion in Reid, held that, as a

"footnote 37 continued"

Nor does the mere fact that Officer Kaiser displayed his badge to identify himself constitute such a show of authority as to constitute a restraint of defendant Wilson's liberty. Since "[T]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on

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"footnote 37 continued"

matter of law, the narcotics agent could not have reasonably suspected the defendant of criminal activity on the basis of the observed circumstances to justify a "seizure" and therefore the appellate court's judgment could not be sustained. Mr. Justice Rehnquist dissented for the reasons stated by Mr. Justice Stewart in Mendenhall concluding that the police conduct involved did not implicate the Fourteenth or Fourth Amendment rights of the petitioners in that "[a] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (Mendenhall, id., at p. 554 [64 L.Ed.2d at p. 509].)

Mr. Justice Powell in his concurring opinion in Reid joined by the Chief Justice and Mr. Justice Blackmun pointed out that

"footnote 37 continued"

the streets" (Terry v. Ohio, supra, 392 U.S. 1, 34 [20 L.Ed.2d 889, 913], Mr. Justice White's conc. opn.), logic and common sense require that an officer dressed in street attire, in accordance with accepted and proper police procedures, identify himself for the obvious well-being of the person being addressed and the officer. There is nothing in the record before us which suggests that defendant Wilson had any objective reason to believe at the time of the initial approach that .

"footnote 37 continued"

in their concurring opinion in Mendenhall they did not consider the seizure issue because it had not been raised in the courts below. He also stated that in any event by not reaching that issue in Mendenhall, "did not necessarily indicate disagreement with the views of Mr. Justice Stewart and Mr. Justice Rehnquist." (Reid, id., at p. 443 [65 L.Ed.2d at p. 895].) Mr. Justice Powell concluded by stating: "The state courts, which decided in this case before our decision in Mendenhall, did not

"footnote 37 continued"

his mobility was impaired and that he was not free to ignore the officer, disregard the request for "a minute of his time" and leave at will. To the contrary, the record shows that defendant Wilson said "Sure" and voluntarily displayed a spirit of apparent complete cooperation.

The circumstances surrounding the initial contact of defendant Wilson by Officer Kaiser as described above are much less intrusive into the private life of

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"footnote 37 continued"

consider whether the petitioner had been seized. Rather, those courts apparently assumed that the stop for routine identification questioning constituted a seizure, and addressed only the question whether the agent's actions were justified by articulable and reasonable grounds of suspicion. Because we similarly do not consider the initial seizure question in our decision today, that issue remains open for consideration by the state courts in light of the opinions in Mendenhall." (Italics added.) (Id., at p. 443 [65 L.Ed.2d at pp. 895-896].)

defendant Wilson than that experienced by the defendants in the Beale case in which the conduct of the law enforcement officers at an airport was held not to constitute a detention. He was merely asked for "a minute of his time." He consented and freely cooperated with the police. In short, the facts of the instant case fall into the category of a mere encounter as distinguished from a detention as those terms are described in the United States Supreme Court Mendenhall case.[38]

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[38]Assuming, arguendo, that California pre-Proposition 8 statutory law (§ 1538.5) and decisional law (People v. Bower, supra, 24 Cal.3d 638; In re Tony C., supra, 31 Cal.3d 888) were applicable, we nevertheless would conclude that Officer Kaiser's initial approach to defendant Wilson was no more than an encounter insufficient to constitute an intrusion which brings into effect the rules applicable to a detention. (See the following cases from this 2d App. Dist.: People v. Jones (1979) 96 Cal.App.3d

"footnote 38 continued"

DISPOSITION

We do not remand the matter back to the superior court to reconsider in light of United States v. Mendenhall, supra, 446 U.S. 544 becasue of the applicability of federal decisional law in the wake of Proposition 8. The testimony of Officer Kaiser and of defendant Wilson (see fn. 4 ante) shows that under all the circumstances surrounding the initial encounter neither defendant Wilson himself nor any reasonable person would believe that defendant Wilson

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"footnote 38 continued"

820 [158 Cal.Rptr. 415], (per Lillie, Acting P. J., Hanson (Thaxton), J., and Ackerman, J.,* conc.); People v. Denman (1980) 112 Cal.App.3d 1003 [169 Cal.Rptr. 742] (2d App. Dist., Div. 5, per Stephens, J., Kaus, P. J., and Ashby, J., conc.); In re Danney E. (1981) 121 Cal.App.3d 44 [174 Cal.Rptr. 123] (per Spencer, P. J., Lillie, J., and Hanson (Thaxton), J., conc.)

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*Assigned by the Chairperson of the Judicial Council.

was not free to leave. (United States v. Mendenhall, supra, 446 U.S. 544.)

The alternative writ heretofore issued is discharged and a peremptory writ is denied.

Lillie, Acting P. J., concurred.

HANSON (Thaxton), J., Concurring.--The instant case involves Proposition 8 issues which are "nonroutine" in nature as clearly evidenced by the speed in which the state Supreme Court is addressing similar Proposition 8 issues presented in the Brosnahan case. (S.F. 24441, 1st Dist. A017791.)

On June 30, 1982, the state Supreme Court by minute order granted a motion to transfer the Brosnahan case to that court. In the same minute order, the state Supreme Court ordered an alternative writ of prohibition to be issued, served, and filed by July 6, 1982; the written return to be served and filed by July 12, 1982; the opening briefs to be filed by July 12, 1982; and reply briefs to be filed by July 19, 1982. The Brosnahan case was argued before the state Supreme Court on July 21, 1982.

The unheard of rapidity in which the state Supreme Court is addressing the Proposition 8 issues presented in Brosnahan is evidence of the urgency it attaches to a resolution of those issues which has rubbed off on this majority.

In the case at bench, on July 1, 1982, following consideration of the briefs filed by the parties as well as amici briefs filed by the Attorney General and State Public Defender offices, this court heard oral arguments and the matter was submitted (see Procedural History and Issues supra). As amici, Deputy Attorney General Shunji Asari and Chief Deputy State Public Defender Charles M. Sevilla also argued. During oral arguments on July 1, the question was posed, in light of the state Supreme Court minute order of June 30, 1982, in the Brosnahan case, whether or

not this court should postpone its decision pending a ruling by the state Supreme Court in Brosnahan. However, Acting Presiding Justice Mildred Lillie pointed out that Chief Justice Rose Bird had been instructing lower courts over the past several years to go ahead and hear all matters before them, "on the theory that they need all the help they can get, I guess."

In Mr. B. E. Witkin's Manual on Appellate Court Opinions, (a Publication of The California Center for Judicial Education and Research, Berkeley, California, West Publishing Company, St. Paul, Minnesota, 1977) in discussing the handling of "nonroutine" cases by the Court of Appeal he states at page 68: "(b) The Nonroutine Case. Two kinds of important cases are decided by intermediate appellate courts: (1) those in which the intermediate court

opinion is a sort of dress rehearsal or preliminary exploration for the high court hearing that is almost sure to follow; and (2) those in which the intermediate court opinion will stand as authority on significant issues, for reasons not always discernible to the litigants or the bar.

"In a case likely to be taken over by the high court, it often seems a thankless task to produce a high-quality opinion. The product is destined to be superseded, and, in a jurisdiction like California, the superseded opinion is consigned to limbo (excluded from the permanent Official Records). (See infra, § 41.) Yet the function of the intermediate appellate court opinion is exactly the same as it is in a case that will stand as a precedent. The court never knows that it will be taken over, and, even if it is, a sound,

well-written opinion has a powerful influence over the decision and the opinion of the high court. In short, the prospect of the case being taken over is a reason not for perfunctory treatment but rather for the best possible judicial product of the intermediate appellate court.

An intermediate appellate court operating in an area of legal uncertainty or conflict does not have the high court's power to resolve problems by definitive pronouncements. But it has the power and the DUTY to bring these conflicts and dark spots to light, sharpening the issues for ultimate consideration by the high court." (Italics added.)

Mr. Witkin, the dean of all California lawyers, in his Manual on Appellate Court Opinions at page 64 points out that the preparation of a formal opinion not

only has the law-announcing function and the dispute-deciding function, but that "'another function is communication with people generally, since the appellate opinion is almost the sole means of such communication by appellate justices'" (Leflar (1961) 61 Colum. L. Rev. 810, 811, 813 (Digested)).

Rule 976(b), California Rules of Court provides: (b) "No opinion of a Court of Appeal ... shall be published in the Official Reports unless such opinion (1) establishes a new rule of law or alters or modifies an existing rule, (2) involves a legal issue of continuing public interest, or (3) criticizes existing law." The case at bench satisfies all three criteria of rule 976(b) reflecting its "nonroutine" nature.

Under the totality-of-the-circumstances,

including the "nonroutine" nature of this case and the "high priority" attached to the resolution of Proposition 8 constitutional issues by the state Supreme Court, as evidenced by its June 30 minute order in Brosnahan and its quick hearing, and no time estimate whatsoever on when the dissenting opinion can be expected, it is my opinion that it is our "DUTY" to file this majority opinion as promptly as possible (Now), pursuant to the authority of 1) article VI, section 3, of the California Constitution, 2) rule 976(c), California Rules of Court, and 3) the Manual on Appellate Court Opinions, The Nonroutine Case, by B. E. Within, supra. (See also for example the state Supreme Court case of California Hotel & Motel Assn. v. Industrial Welfare Com. (1979) 25 Cal.3d 200, 201 [157 Cal.Rptr. 840, 599 P.2d 31]--

majority opinion filed Aug. 13, 1979, separate, dissenting opinion and separate response to the dissenting opinion filed Sept. 7, 1979; see also Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal.App.3d 964 [176 Cal.Rptr. 14].)

In the interest of completeness of a reviewing court's product, whenever possible, separate dissenting and/or concurring opinions should be filed contemporaneously with a majority opinion. Unfortunately that cannot always be accomplished as evidenced by the State Supreme Court case of California Hotel & Motel Assn. v. Industrial Welfare Com., supra, 25 Cal.3d 200.[1]

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[1]In California Hotel, as noted, the majority opinion was filed on August 31, 1979, and the separate dissenting opinion, along with a separate response to the dissenting opinion by one of the signatories to the majority opinion, was filed on

With the advent of the passage of Proposition 8, on June 8, 1982, an abrupt metamorphosis set in immediately changing the instant case from a "routine" into a "nonroutine" one requiring additional briefing and oral argument (People v. Brigham (1979) 25 Cal.3d 283 [157 Cal.Rptr. 905, 599 P.2d 100]) and bringing into play basic constitutional principles and well-established axioms.

"footnote 1 continued"

September 7, 1979--some three weeks later. Thus, every member of the panel was afforded ample opportunity to express an opinion and to have his or her "say."

The California Hotel decision does not disclose the reason(s) for the differential in time in the filing the majority opinion and the dissenting opinion (presumably because the dissent did not complain). However, inferentially the reason(s) are not substantially dissimilar to those faced by the majority in the instant case compounded by the high-priority nature of this case.

A basic constitutional principle is that the California Constitution is the supreme law of the state except for the supremacy of the United States Constitution as recognized in article III, section 1, of the California Constitution. The Proposition 8 initiative passed by the electorate on June 8, entitled "Constitutional Amendment" was presumed valid, in full force and effect, and the supreme law of the state, effective as of June 9, 1982, albeit subject to attack by the constitutional issues raised in the instant case in the State Supreme Court Brosnahan case.

It is axiomatic that litigants and counsel in any case, including the case at bench, are entitled to a decision based on existing controlling law. A fortiori, it became necessary to first address and resolve the important Proposition 8 constitutional issues raised in the instant case

before addressing the determinative (detention) issue presented. (See Issues, ante, pp. 1077-1078, and Discussion--Background, ante, p. 1079 majority opn.) Moreover, this basic axiom renders it immaterial that California pre-Proposition 8 statutory and case law would require the same result (see fn. 38, ante, p. 1133, majority opn.) unless as public servants, we were to shirk our duty and sweep a "Constitutional Amendment" (Prop. 8) under the rug as if it never existed thereby ignoring the command of the sovereign people and our Oath of Office to "bear true faith and allegiance to the Constitution of the United States and the Constitution of California." (Art. XX, § 3, Cal. Const.)

The "nonroutine" nature and "high-priority" character of the case at bench and the urgency for resolution of Proposition 8 constitutional challenges (as

obviously recognized by the state Supreme Court by its compressed six-day time schedule for the filing of briefs in Brosnahan and swift calendaring of the Brosnahan constitutional challenge to the initiative measure) is made apparent to even a casual observer by the clamoring for reviewing court guidance by lawyers and trial court judges up and down the state involved in the criminal justice system faced with a horrendous case load of increased criminal filings.[2] Criminal

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[2]The "1982 Judicial Council Report" to the Governor and the Legislature and the Annual Report of the Administrative office of the California courts (dated Jan. 1, 1982), shows the criminal filings in the superior and municipal courts statewide during fiscal year 1980-1981 to be as follows:

Superior Courts: "Criminal filings increased by 7,000 cases or 12 percent in 1980-1981. This increase was the second highest of all proceedings and the largest for the criminal category in the past 10

cases in the Court of Appeal also started to stack up awaiting a resolution of the Proposition 8 facial constitutional issues and particularly the Truth-in-Evidence provision retroactivity issue.

"footnote 2 continued"

years. It was also almost double the previous high increase of 4,000 cases recorded in 1979-1980. The 65,000 criminal cases filed in 1980-1981 was the highest since 1971-1972 when 65,000 cases were filed. Some of the counties that reflected large increases were Los Angeles (+1,025), San Diego (+577), and Alameda (+394)." (P. 69.)

Municipal Courts: "Felony filings registered an 11 percent increase in 1980-1981. This is the largest increase in the last ten years and is the second consecutive large increase for felony filings. Of the 84 municipal courts, 14 had decreases in felony filings totaling 1,051, while the remaining 70 courts had increases totaling 13,752 felony filings. Twenty-three courts had increases of 25 percent or more in felony filings, and these courts account for 5,129, or 37 percent, of the 13,752 felony filings. Los Angeles Municipal Court and Santa Clara County Municipal Court had increases of 17 percent and 13 percent respectively, for a total of 3,019 filings or 22 percent. The remaining 45 courts which experienced increases in felony filings accounts for the remaining 42 percent of the 1,752 felony filings." (P. 99.)

In view of the foregoing, some indication of when the dissenting opinion would be ready for filing was not an unreasonable request--it was indeed an essential one. No such indication was forthcoming.

While Acting Presiding Justice Mildred Lillie was of the view that some additional time should be given to prepare the dissent before filing the signed majority opinion, this writer has decided to file the majority opinion immediately.

"IN NO WAY under the circumstances could or should control over the time of filing a 124-page majority opinion, involving such important statewide concerns as presented here OR the First Amendment rights of the majority, be relinquished to a minority-of-one who has manifested an intent to treat the matter as merely routine by adamantly refusing

to give any time estimate whatsoever.

Absent some good faith estimate of when the separate opinion would be ready, the decision to file the majority opinion is the only viable course of action available in order to eliminate the risk of the majority opinion ever timely seeing the light of day, if at all. Moreover, by filing the majority opinion any possibly perceived "pressure" to move expeditiously in preparation of a separate opinion is relieved, an ample 30-day time period being afforded to more leisurely accomplish that task. In brief, what this may boil down to is a difference of opinion as to perceived priorities and marching to the cadence of different drummers.[3]

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[3] "If a man does not keep pace with his companions perhaps it is because he hears a different drummer. Let him step to the music which he hears, however measured or far away." (Henry David Thoreau.)

Hopefully the research, thoughts, and reasoning contained in this opinion in respect to Proposition 8 constitutional issues will be of assistance to the state Supreme Court in deciding the Brosnahan case.

A final caveat, "It is not the function of our government to keep the citizens from falling into error; it is the function of the citizen to keep the government from falling into error." (Supreme Court Justice Robert H. Jackson.)

The common thread running through all of the revered Thomas Jefferson's brilliant writings is "TRUST THE PEOPLE."

On August 20, 1982, Hanson (Thaxton), J., filed the following concurring opinion: HANSON (Thaxton), J., Concurring--The Proposition 8 (victims' Bill of Rights) initiative issues presented here are the

most important issues in memory impacting on California's criminal justice process. The majority having been denied sufficient time to respond to the separate minority opinion, in lieu thereof, I expand the "Discussion" portion of the majority opinion with some theoretical views on the "WHY?" of Proposition 8 and add material on the Truth-in-Evidence provisions abolition of the Exclusionary Rule under California law and supportive of the complete abolition of that rule on the federal level nationwide.

THE "WHY" OF PROPOSITION 8

In October 1977, Dr. Vernon L. Grose, B.S., M.S., D.Sc., Vice President of Tustin Institute of Technology, Santa Barbara, California,[1] a systems

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[1]Dr. Grose, in 1971 was appointed by the Governor of California to the California Council on criminal justice as the

management expert, was the keynote speaker to "The Task Force on the Appellate Process," of the "Fourth California Conference

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"footnote 1 continued"

sole specialist in research, development and systems technology. In 1972-1973, he was a member of the Governor's Select Committee on Law Enforcement Programs and served on the Board of Directors of the California Crime Technological Research Foundation.

Prior to joining the Tustin institute in 1966, Dr. Grose was an engineer, author, lecturer and aerospace executive. While a member of the Applied Physics Staff of the Boeing Company, he wrote the development test program for the Minuteman ICBM. From 1959-62, he was Director of Reliability and a member of the Executive Staff of Litton Industries where he also was Program Manager of Project SPARR, an Air Force program of basic and applied research on space system problems. His industrial involvement in manned space programs--Mercury, Gemini and Apollo--began at Northrop in 1962 where he was Director of Applied Technology and culminated in 1966 at Rocketdyne as an Engineering Chief, working with on-board rocket propulsion systems for Projects Gemini and Apollo. Dr. Werner von Braun appointed him to the NASA Safety Advisory Group for Space Flight in 1969. Over 30 journals and periodicals have published his papers.

on the Judiciary."[2]

Speaking as a layman and as a systems management expert during his remarks, Dr. Grose concluded "[T]here is no criminal justice system!" He stated in part:

"What does the public want? They want respect for the law. What does the public get? A deliberate encouragement to flaunt the law! I recently completed a three-year term as Curriculum Commissioner here in California, selecting and approving textbooks for the public schools. I was abhorred to discover that we are no longer teaching our children to obey the law. Instead, we are teaching them to test the law! And there is a tremendous difference between the two concepts. You

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[2]The conference was sponsored by Citizens for Law Enforcement Needs (CLEN). The conference chairman was Presiding Justice Robert K. Puglia, Third Appellate District, Sacramento.

people here in this room--responsible members of the criminal justice world--must bear the blame for this shift.

"The public also wants the truth to be ascertained in the courtroom. What do they get? Legal gamesmanship, shifty shenanigans, and baffling buffoonery. ...

"Probably the primary demand that the public would place on courts is to interpret the law. What do they get? Legislation of new laws. ...

"Even a small child recognizes that the two most meaningful aspects of justice are swiftness and certainty. No one is proposing arbitrary, capricious or erratic court decisions in order to achieve rapid disposition of cases. However, we have every right to expect that 'the right to a speedy trial' enjoyed by the accused under Article VI of the Bill of Rights

would produce something far better than the unbelievably slow disposition we are now realizing.

"We might even be less restive about the snail's pace of disposition of cases if the verdicts that ultimately resulted had any degree of singularity or certainty. ...

"What does the public find in the appellate process? Problems, problems, problems--delay in the trial court, delay in pretrial appellate review, trial bench uncertainty, lack of finality of any verdict, too many avenues for reversal of a verdict, ambiguity of decisions, deliberate enticement to appeal every decision. ... "

Dr. Grose, during his presentation used slides of graphs and charts to explain his views. He further stated:

"While I was a member of the Governor's

select Committee on Law Enforcement in 1973, we invited the futurist intellectual Herman Kahn to meet with us. He talked at length about what he defined as 'the upper middle, elitist, humanist left viewpoint' and how it contrasted with the traditional Judeo-Christian belief system in this country. Figure 14 [foll. at p. 1141] is a simplified comparison of the two.

ETHICAL CHARACTERISTICS

HUMANIST ETHIC	JUDEO-CHRISTIAN ETHIC
No individual responsibility/ accountability	Individual is responsible / accountable
Libertinism	Prohibitionism
Sickness	Sin
Welfare Ethic	Work Ethic
Permissive culture	Authoritarian culture
Man is the ultimate being	God is the ultimate being
"Change equals progress"	"Change only if proven superior"
Society is the source of problems	Individual is the source of problems
Protect the rights of the accused	Protect the rights of law-abiding public
Treat criminal based on society's needs	Punish criminal based on moral outrage
Situational ethics (relative values)	Universal ethics (absolute values)

FIGURE 14

"Kahn observed, as shown in Figure 15 [foll. at p. 1142] that the distribution of conviction between the two ethics is lopsided. Eighty percent of America is still committed to the Judeo-Christian ethic. Only 20 percent of us are on the Humanist side. Yet, because Humanism controls the three primary voices in society--academia, news media and the courts, Humanism dominates all rhetoric. In a sense then, a small minority--an elitism of sorts--subjugates the majority. The only voice for the majority is their vote." (Italics added.)

DISTRIBUTION OF INFLUENCE

HUMANIST	JUDEO-CHRISTIAN
20% OF AMERICA	80% OF AMERICA
Voice or articulation: Academia News media Courts	Voice or articulation: Only their vote
(Obsession with "What ought to be")	(Concern for "What is")

SOCIETY LEVERS—Capital Punishment, Sex Education, Burning, Homosexuality Etc.

If the law is "The expressed will of the people" (and not some universal & absolute but mysterious maxim), court decisions should reflect the people—whether or not the judge holds contrary personal views.

FIGURE 15

In his concluding remarks, Dr. Grose stressed how the citizenry was deeply concerned and disturbed about criminal justice in California. He then closed by posing two provocative questions:

"1. You who are skilled in the law created this mess. Can you fix it without outside help--or must our system of laws ultimately fall? (The prehistoric stegosaurus became bigger and more ponderous until it fell over on its side--whereupon the ants ate it.)

"2. At what point of breakdown of justice would you expect the public to rise up and storm the courts?"

What relevance does Dr. Grose's remarks, Herman Kahn's views, and the above two closing questions by Dr. Grose have to the case at bench involving the Proposition 8 initiative which was passed

four years later in 1982?

The relevancy is that public concern over the intolerable crime rate (see FBI Crime Index Statistics on California, majority opinion, ante, pp. 1116-1117, and the inability or unwillingness of the legal community and those involved in the criminal justice process ("mess") to "fix it" by putting their own house in order drove up public dissatisfaction and resentment to such a level (see fn. 20, ante, p. 1098, majority opn.) that concerned citizens were compelled to "fix it" themselves.

The citizenry did not "storm the courts," they addressed the problem by the only responsible means available to them to articulate their dissatisfaction with their criminal justice system. They collected 663,409 signatures on petitions to place the Proposition 8 initiative (the

Victims' Bill of Rights) on the ballot and then 2,770,225 Californians "stormed the ballot boxes" with their votes passing the initiative. (See Dr. Grose's chart, figure 15, ante.)

Indeed, the constitutionally sanctioned initiative process in California may well turn out to be the sole means of saving our society from following ancient Rome into the dust heap of history.

The similarities of conditions which existed prior to the fall of Rome and those that Californians are experiencing today are striking.

The most potent and forcible cause of the destruction of ancient Rome was the breakdown of law and order. "At such a time, ... none could trust their lives or properties to the impotence of law, ... citizens were armed for safety, ...

against the domestic enemies whom they feared and hated. Except for Venice alone, the same dangers and designs were common to all free republics of Italy."[3] (3 Gibbon, "The Decline and Fall of the Roman

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[3]Of interest also are the striking similarities of the unsettling problems caused today by the unfettered proliferation of complex rules, regulations and statutes as experienced by the Roman Empire prior to its decline and fall.

In ancient Rome, the Decemvirs* inscribed on brass, or wood, or ivory, the TWELVE TABLES of Roman laws (some believed that deputies of Rome visited Athens under the administration of Pericles, and the laws of Solon were transfused into the Twelve Tables).

"The Twelve Tables were committed to the memory of the young and the meditation of the old; they were transcribed and illustrated with learned diligence; they had escaped the flames of the Gauls, they subsisted in the age of Justinian, and their subsequent loss had been imperfectly restored by the labours of modern critics. But, although these venerable monuments

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*"DECEMVIRS--"The ten men," a name applied by the Romans to any official commission of ten followed by a statement of the purpose which the Commission was appointed, e.g., the judicial board of decemvirs.

Empire," The Modern Library, Random House, New York, p. 870.)

The increasing numbers of crimes being perpetrated on law-abiding California citizens in recent years are of gigantic proportions and closely parallel the breakdown of law and order that contributed to the fall of Rome. During the 10-year period 1971 through 1980, an astronomical total of 8,914,372 Californians have either been slaughtered, forcibly raped, robbed and stripped of their belongings at gun or knifepoint, assaulted, their homes and businesses forcibly broken into and plundered, or subjected to thievery of their hard earned money and personal property.

"footnote 3 continued"

were considered as the rules of right and the fountain of justice, they were overwhelmed by the weight and variety of new laws which, at the end of five centuries, became a grievance more intolerable than the vices of the city. Three thousand

(See majority opn., ante, p. 1116.)

Today no California citizen can feel certain that he or she will escape the ravages of such crimes. For their own protection citizens are compelled to arm themselves and to expend huge sums of money in order to provide for their personal safety by turning their private

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"footnote 3 continued"

brass plates, the acts of the Senate and people, were deposited in the capitol; and some of the acts, as the Julian law against extortion, surpassed the number of a hundred chapters. The Decemvirs had neglected to impart the sanction of Zaleucus* which so long maintained the integrity of his republic. A Locrian who proposed any new law stood forth in the assembly of the people with a cord round his neck, and if the law was rejected, the innovator was instantly strangled." (2 Gibbon, "The Decline and Fall of the Roman Empire," The Modern Library, Random House, New York, pp. 673-674.)

*According to Gibbon, Zaleucus had the merit and glory of converting a band of outlaws (the Locrians) into the most virtuous and orderly of the Greek republics which lasted 200 years.

homes into fortresses, installing burglar alarms and steel bars on their doors and windows and hiring private security guards. The criminals roam at will while senior citizens, particularly the more aged, now often consider themselves to be prisoners in their apartments and condominiums because it is no longer safe to walk the streets.

During that 10-year period of 1971 through 1980 there were 23,092 wilful homicides in California. (See majority opn., ante, p. 1116.) That adds up to the gruesome fact that over twice the number of Californians have been butchered by criminals in their own home state than were killed in action (KIA) while engaged in mortal combat in both the Korean and Viet Nam Wars. The number of Californians slaughtered by home grown enemies of

society between 1971 and 1980 exceed half of all the Californians killed in action during World War II in both the European and Pacific theatre of operations. (Californians KIA: Korean war--6,050; Viet Nam war--5,472; World War II--44,660.)[4]

In addition to the carnage described above during the 1971-80 time frame 98,404 forcible rapes were violently committed leaving their victims psychologically scarred for the rest of their lives; 613,514 California citizens were robbed of their hard earned moneys and personal effects; 717,226 California citizens were physically assaulted, many sustaining permanent injuries; and 4,550,111 personal

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[4]Official California KIA statistics supplied by Major Robert L. Kingsbury, USA (Ret.), Director, Department of Military and Veterans Affairs, County of Los Angeles, Patriotic Hall.

homes and businesses were broken into and burglarized.

The latest statistics show that crime relentlessly continues to increase at an alarming rate. Major crime in the city of Los Angeles alone jumped nearly 8 percent in the first half of 1982 over the same period last year according to the Los Angeles Police Department report to the FBI. For example, there were 430 murders as of June 30, 1982, (up 5.7 percent over the same 6-month period in 1981). The number of reported armed robberies in Los Angeles went from 12,807 in the first 6 months of 1981 to 14,328 for the same 6 months in 1982. The number of forcible rapes rose from 1,297 for the first half of 1981 to 1,336 this year. (See, Los Angeles Herald Examiner (July 22, 1982) p. A5.)

From the foregoing statistics it is clear that in recent years an undeclared state of war, with increasing tempo, has been in progress between the lawless elements in our society and the law-abiding citizens--and the law-abiding citizens have been losing. Proposition 8 (the Victims' Bill of Rights) can be viewed as a realization and acknowledgement that such a war exists and it may best be characterized as a declaration of war by the sovereign people against the lawless elements in our society.

In a Democratic Republic such as ours where the Constitution vests the ultimate power in the people, the collective wisdom of the 2,770,225 Californians who voted for and passed Proposition 8 cannot be cavalierly ignored by governmental officials (servants) charged with the responsibility

of carrying out the will of the people, most of whom hold appointive office, elected by nobody.

In short, the California electorate in passing Proposition 8 has, in essence, said: "We are greatly dissatisfied with and disapprove the manner in which the criminal justice system is handling the gargantuan crime problem--Try this!"

ABOLITION OF THE EXCLUSIONARY RULE

Following the filing of the majority opinion of the case at bench the Los Angeles Daily Journal on July 27, 1982, fairly and accurately summarized its holdings under the heading "PANEL OKs PROP. 8, Retroactive Use of Evidence Section--FIRST APPELLATE DECISION." (By Alan Ashby.) The article noted that: "The court also devoted 24 pages of its lengthy decision to a frontal assault on the

exclusionary rule itself, concluding that it 'is a costly failure and as destructive to California's criminal justice system as the medfly is to California's farm industry.'"

In addition to a "frontal assault on the exclusionary rule itself" the reserve is now committed in a verticle and a double envelopment in the form of a recently expressed view of California's No. 1 lawyer, Mr. B. E. Witkin.[5] (This reserve force is figuratively speaking speaking roughly equivalent in legal scholarship, experience and common sense

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[5]Mr. Witkin's contribution to California jurisprudence is legendary. His many volumes on a wide range of legal subjects, including comprehensive coverage of California civil and criminal law, substantive and procedural, are staples for all California's law firms and court libraries. A nationally known scholar, Witkin is a frequent lecturer at judicial institutes throughout the nation. He has worked on the staff of the California Supreme Court and for 25 years directed bar review courses for state bar applicants.

to one airborne division air dropped behind the lines and an envelopment of both flanks by an armored division.)

In a recent interview of Mr. Witkin by Editor Diana Diamond and Associate Editor Jonathan Maslow, of the California Lawyer, a publication of the State Bar of California,[6] the following question was asked and answered:

"Q. DO YOU THINK THE EXCLUSIONARY RULE SHOULD BE ABOLISHED?

"A. [By Mr. Witkin] IT WAS WRONGLY INSTITUTED HAS BEEN BADLY ADMINISTERED AND SHOULD BE ABOLISHED. WE SHOULD NOT ALLOW THE LEGISLATIVE PROCESS TO FORMULATE RULES THAT WOULD ABUSE PEOPLE'S RIGHT OF PRIVACY. BUT THE EXCLUSIONARY RULE IS SO BAD THAT I THINK ANY CRITICISM OF IT IS JUSTIFIED." (Emphasis added.)

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[6]See "B.E. Witkin: 'OUR LEGAL SYSTEM IS IN JEOPARDY'"; CALIFORNIA LAWYER, published by The State Bar of California, September 1982 (vol. 2, No. 8, p. 82).

On August 20, 1982, Dalsimer, J., filed the following dissenting opinion:

DALSIMER, J.--I dissent.

REASON FOR INDEPENDENT FILING

The highly irregular action of the majority in filing its decision without affording me a reasonable opportunity to participate therein has deprived the litigants in this case of their constitutional right to have this court conduct itself as a three-judge court.[1]

A review of the history of article VI, section 3, demonstrates that the right

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[1]California Constitution, article VI, section 3, provides in pertinent part: "The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions. Each division consists of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall conduct itself as a 3-judge court. Concurrence of 2 judges present at the argument is necessary for a judgment."

to a three-judge court is substantial. Prior to 1966, article VI, section 4a, of the California Constitution provided in pertinent part that "The presence of two justices shall be necessary for the transaction of any business by such court except such as may be done at chambers, and the concurrence of two justices shall be necessary to pronounce a judgment." In 1966, article VI, section 4a, was repealed and article VI, section 3, was adopted. The original draft of article VI, section 3, as proposed by the California Constitution Revision Commission read in pertinent part as follows: "The Legislature shall divide the State into districts each containing a court of appeal with one or more divisions. Each division consists of a presiding justice and 2 or more associate justices. It has the power of a court of appeal and shall sit in panels of 3 judges.

Concurrence of 2 judges present at the argument is necessary for a judgment." As finally adopted, the provision stated that each division "shall conduct itself as a 3-judge court." Substitution of the phrase, "shall conduct itself as a 3-judge court," for the phrase, "and shall sit in panels of 3 judges," clarifies the drafters' intention that a full exchange of views by all members of the panel take place prior to the court's filing of its opinion.

Because of the disregard of judicial protocol by the majority, I must explain that the majority's departure from orderly judicial procedure was not of my doing.

This case was assigned to Justice Hanson on February 25, 1982. It was argued and submitted for the second time on July 1, 1982. On July 23, 1982, just 2 days delivering to me his 125-page typewritten opinon, Justice Hanson informed me

that Justice Lillie had signed the opinion and that he had filed it. He stated that he had taken this action because I was not able to tell him when I would have my dissent prepared. Five typewritten pages had been added to the opinion after it was presented to me and before filing. Only Justice Hanson signed the concurring opinion.

Justice Hanson's concurring opinion is apparently an attempt to rationalize the majority's unprecedented departure from accepted appellate court procedure, citing as authority therefor article VI, section 3, of the California Constitution; Witkin's "Manual on Appellate Court Opinions"; California Hotel & Motel Assn. v. Industrial Welfare Com. (1979) 25 Cal. 3d 200 [157 Cal.Rptr. 840, 599 P.2d 31]; and Hoffman v. Security Pacific Nat. Bank (1981) 121 Cal.App.3d 964 [176 Cal.Rptr.

14]. None of these authorities supports his thesis. As the Supreme Court had already taken jurisdiction over the issue of the constitutionality of Proposition 8, received briefs, heard oral argument, and begun considering its decision thereon prior to the filing of the majority opinion, the majority knew that the precedential value of its opinion would be, at best short-lived.

I know of no authority for the reasoning announced by Justice Hanson that an intermediate appellate court should rush to publish its own judgment on a subject already heard and under consideration by the Supreme Court. Indeed, the only authority cited by Justice Hanson for this conclusion is a statement made by Justice Lillie during the oral argument of this case. That remark was characterized by

Justice Lillie as a "guess" when she made it.

The self-imposed duty (conc. opn., ante, p. 1135) to file this case without waiting a reasonable time for the decision of all members of the panel in order to "assist" the Supreme Court in its resolution of a controversy it has under consideration unfortunately conflicted with the duty of this court to calmly, deliberately and judiciously decide the issues before it. Further, it prevented the majority from hearing, let alone considering, my views on this case and from conferring with me about them.

HOW PROPOSITION 8 BECAME AN ISSUE

The majority opinion implies that the parties injected the issue of the applicability of Proposition 8 into this case. Justice Hanson implies the same thing at page 1134 of his concurring opinion.

These implications are contrary to fact. Justices Hanson and Lillie, shortly after the June 7, 1982, election, without consulting me, orally directed the clerk of the court to telephonically order the litigants and to invite amici to file briefs on the applicability to this case of Proposition 8. I was not consulted by my colleagues in this regard and was not notified of their action until approximately a week later. At my insistence, the previous submission of the case was vacated and the matter was set for further argument.

APPLICABILITY OF PROPOSITION 8 TO THIS MATTER

The views of the majority concerning the constitutionality of Proposition 8 are mere obiter dictum. The issue as to whether Mr. Wilson was "detained" or "seized" is not now and never has been an issue to be decided on independent state grounds. Both

People v. Bower (1979) 24 Cal.3d 638 [156 Cal.Rptr. 856] and In re Tony C. (1978) 21 Cal.3d 888 [148 Cal.Rptr. 366, 582 P.2d 957] were decided on federal constitutional grounds.[2] The majority at page 236 declares that Bower and In re Tony C. have been "rendered inapplicable" because those decisions predated and thus did not consider United States v. Mendenhall (1980) 466 U.S. 544 [64 L.Ed.2d 947, 100 S.Ct. 1870].

As Justice Thompson announced, speaking for this court in Civil Service Commission v. Superior Court (1976) 63 Cal.App.3d 627, 631 [133 Cal.Rptr. 825] (Lillie, J., conc.; Hanson, J., conc. and dis.), "Auto Equity Sales, Inc. v. Superior Court (1962)

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[2]Clearly, People v. Bower was also decided on state constitutional grounds, but the court made no distinction between the two constitutional bases for its decision.

57 Cal.2d 450 [20 Cal.Rptr. 321, 369 P.2d 937] dictates unequivocally that we follow the enunciated by the high court. There is no exception in Auto Equity Sales for Supreme Court cases of ancient vintage. If [an early Supreme Court case] does not comport with the standards of review required by [a later Supreme Court case], where the party seeking judicial review is indigent, that proposition is not ours to announce." Likewise, if the holdings in Bower and Tony C. do not comport with the interpretation of the initial seizure question in light of Mendenhall, that proposition is not ours to announce. As Bower and Tony C. constitute interpretations by our Supreme Court of the federal Constitution and as those decisions have not been overruled or disapproved by the United States Supreme Court, it is incumbent upon us to follow those interpretations. "Courts exercising inferior

jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court. [Citations.]" (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].)

That a consideration of the constitutionality of Proposition 8 was unnecessary to its decision is conceded by the majority. In footnote 38 (majority opn., ante, p. 1133), the majority declares that is conclusion that Wilson was not illegally detained would be the same even if it had decided the issue under People v. Bower, supra, 24 Cal.3d 638, and In re Tony C., supra, 21 Cal.3d 888. This concession underscores the conclusion that the majority's opinion on Proposition 8 is obiter dictum. That is, as the majority states that its solution to the question

presented by this case would have been reached without regard to the constitutionality of Proposition 8, then any discussion thereof was not only unnecessary, but also irrelevant and of no force in law.

THE DETENTION ISSUE

The merits of the case before us compel the conclusion that petitioner was unlawfully detained. (People v. Bower, supra, 24 Cal.3d 638; In re Tony C., supra, 21 Cal.3d 888.) The majority at page 236 declares that the language in Mendenhall "pertaining to the 'detention' issue is dispositive of the instant case." I find this statement astounding in view of the fact that only two justices signed that portion of the majority opinion which dealt with the detention issue. Four justices (White, Brennan, Marshall, and Stevens) concluded that Ms. Mendenhall had

been "seized,"[3] and three justices (Powell, Blackmum, and Chief Justice Burger) concluded that the "seizure" question need not be reached. The latter justices felt that the federal agents had a reasonable suspicion that Ms. Mendenhall was engaging in criminal activity and thus had the right to stop her. (United States v. Mendenhall, supra, 446 U.S. 544, 560 [64 L.Ed.2d 497, 513].)

We find then that the majority herin is is relying on the view of only two justices of the United States Supreme Court to hold that cases decided by the California Supreme Court "have been rendered inapplicable." (Majority opn., ante, pl 1125.) The majority's conclusion in this regard becomes even more astounding when it is remembered that our Sumpreme Court directed

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[3]The federal judiciary uses the terms "seized" and "detained" interchangeably.

us to issue the alternative writ herein and specifically called our attention to Bower and Tony C.

In determining in various cases whe whether a person's rights under the Fourth Amendment to the United States Constitution have been violated by law enforcement officials, the courts have employed a variety of words to describe the initial meeting of the citizen and the officer. Unfortunately, it would appear that to some this constitutional problem can be resolved by a resort to semantical nicety. Thus, it has been said that when the court stated In re Tony C., supra, 21 Cal.3d 888, "If the individual is stopped or detained because the officer suspects he may be personally involved in some criminal activity, his Fourth Amendment rights are implicated and he is entitled to the safeguards of the rules set forth above," (id., at p. 895),

it predicated that rule on the assumption that the individual is "stopped or detained." (People v. Jones (1979) 96 Cal.App.3d 820, 825 [158 Cal.Rptr. 415].) Again, it was said in People v. Denman (1980) 112 Cal. App.3d 1003, 1009 [169 Cal.Rptr. 742], "The issue here, as in Jones [People v. Jones, supra, 96 Cal.App.3d 820], is not whether Deputy Wolfe suspected appellant of criminal activity, but whether in the first instance the deputy's conversation with appellant constituted a stop or detention under Tony C."

Such semantical subtleties beg the question. The task is to identify the quality of the meeting, intrusion, contact, or any other of a myriad of terms that describe the initial encounter. As the Supreme Court pointed out, the quality of the intrusion may be ascertained by determining the purpose of the officer's conduct.

(In re Tony C., supra, 21 Cal.3d 888, 895.) If the subject is approached by the officer to be questioned not as a suspect, but as a witness, or if the officer is accosting the individual for a reason clearly unconnected with the detection or investigation of crime, no "detention" or "seizure" occurs. Conversely, if the purpose of the officer in speaking to the citizen is based on the officer's suspicion that the citizen is involved in criminal conduct, then the citizen is entitled to the rights afforded him under the Fourth Amendment.

If there remained a doubt concerning the method for determining what constitutes a detention after the Tony C. decision, such doubt was clearly removed by the decision in People v. Bower, supra, 24 Cal.3d 638. "Courts have broadly defined the term detention. The United States Supreme Court has held that 'whenever a police officer accosts an individual and restrains

his freedom to walk away, he has "seized" that person' within the meaning of the Fourth Amendment. [Citation.] . . . Most recently, this court added a separate, new test. A detention also occurs whenever an officer accosts an individual on suspicion that the person 'may be personally involved in some criminal activity. . . .' [Citation.]" (Id., at p. 643.)

There can be no question but that the contact with Mr. Wilson constituted a detention under the Bower definition. At the suppression hearing the following colloquy ensued between Officer Kaiser and the prosecutor: "[Officer Kaiser:] I approached Mr. Wilson, and I displayed my police identification to him. [¶] I told him I was a police officer; and I asked him if I might have a minute of his time. [¶] [Prosecutor:] What did he say? [¶] [Officer Kaiser:] He stated 'Sure.' [¶] [Prosecutor:] What happened next? [¶] [Officer Kaiser:] At this time, I advised

Mr. Wilson that I was conducting a narcotics investigation, and that we had received information that he would be arriving today from Florida carrying a lot of drugs."

In addition to being a "detention" under Bower, the police-Wilson contact was a "seizure" or "investigative stop" under Terry v. Ohio (1968) 392 U.S. 1, 19, footnote 16 [20 L.Ed.2d 889, 905, 88 S.Ct. 1868]: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." (Italics supplied.)

Even Justices Stewart and Rehnquist, upon whose opinion the majority relies, condede, " . . . a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." (United States v.

Mendenhall, supra, 446 U.S. 544, 554, fn. omitted [64 L.Ed.2d 497, 509].) Any "reasonable person" upon being confronted by a man who identifies himself orally and by display of credentials as a police officer and who states that he is conducting a narcotics investigation of the accosted person based on information that such person was arriving at the scene "carrying a lot of drugs" would believe that he was not free to leave. Indeed, if under all of those circumstances a person believed that he were free to leave, not only would he be "unreasonable," but also he would be out of touch with reality. As the court observed in In re Tony C., supra, 21 Cal.3d 888, in discussing citizen reaction to police contact, " . . . either through fear or respect, many persons who are not in fact under detention nevertheless do not feel free to leave at will when a uniformed police officer indicates a desire

In the case at bench, the officer believed at the time he approached Mr. Wilson that he had reasonable grounds to make an investigatory stop. But the fact is that the officer had no such grounds. This was conceded by counsel for the People at oral argument when he said, "[Y]ou have extremely thin facts otherwise to stop this individual . . . . I'm not going to even argue to this court a valid detention. In other words, if you don't buy my first argument [that the stop was not a 'detention' or 'seizure'], I guess I'm in trouble."

In summary: Proposition 8 has no application to this case; this court is compelled to follow the law as enunciated by the California Supreme Court; and under the law as announced by the highest court of this state as well as by the United States Supreme Court, the petitioner was illegally seized or detained. A peremptory writ should be issued.

to talk with them." (Id., at p. 895.) It is true that Officer Jenkins was not uniformed, but in view of the display of police identification, that is a distinction without a difference.

As the majority points out (majority opn., ante, p. 1131, fn. 37), three justices in a concurring opinion in Reid v. Georgia (1980) 448 U.S. 438 [65 L.Ed.2d 890, 100 S.Ct. 2572], decided after Mendenhall, believe that the question of what constitues a "seizure" or "detention" is left open by the Supreme Court. (Id., at p. 443 [65 L. Ed.2d at p. 895].) However, a unanimous court held in Brown v. Texas (1979) 443 U. S. 47 [61 L.Ed.2d 357, 99 S.Ct. 2637] that in the absence of reasonable suspicion that a person was engaged, had engaged, or was about to engage in criminal conduct, such person could not be stopped and questioned. (Id., at p. 51 [61 L.Ed.2d at p. 362].)

On August 20, Hanson (Thaxton), J., with Lillie, Acting P. J., concurring, filed the following opinion relative to the dissenting opinion of Dalsimer, J. (see ante, p. 1147).

HANSON (THAXTON), J.--The majority opinion stands on its own reasoning in resolving the important issues raised in the instant case and the disposition of the matter, as do the reasons and legal authority backing the decision to file the majority opinion of this "high-priority" case as promptly as possible.

The majority of this panel would have preferred an opportunity to respond to the treatment of any issues or nonissues, as the case may be, of the minority separate opinion as was afforded in California Hotel & Motel Assn. v. Industrial Welfare Com. (1979) 25 Cal.3d 200 [157 Cal.Rptr. 840, 599 P.2d 31]. However, we have been denied

that opportunity because no drafts of the minority opinion have been furnished to the majority members of the panel in sufficient time to respond prior to the expiration of the jurisdictional 30-day time limit.[1]

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[1] In sharp contrast, the minority member of this panel (in addition to being supplied a copy of all supplementary briefs as soon as they were filed with the court prior to oral arguments) has had about seven weeks from the time of oral arguments on July 1, 1982, when a bench copy of a rough proposed opinion* was made available and about four weeks since the majority opinion was filed on July 23+ to prepare a separate opinion.

*A rough 88-page proposed bench draft was furnished to each panel member on June 30 for use at the time of oral arguments which were held on July 1, 1982.

A reworked beefed-up 115-page majority opinion characterized as a final draft (not cite checked or proofread) was furnished to each member of the panel on July 13. This draft was essentially the same in general content and result as to the bench draft except for adding a discussion of the relevancy of the important United States Supreme Court case of Crawford v. Board of Education

"footnote continued"

Lillie, Acting P. J., concurred.

"footnote 1 continued"

(1982) __U.S.__ [__ L.Ed.2d __, __ S.Ct. __] (decided on June 30, 1982).

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†The 124-page majority draft opinion which was filed on July 23 was essentially the same as previous drafts in content and result except for some structural changes and adding Proposition 8's adherence to fundamental constitutional principles and purposes (majority opn., ante, pp. 1096-1099) and additional statistics from the FBI Crime Index.

The final five pages were added prior to the filing of the majority opinion on July 23, 1982, following an unequivocal flat-out refusal on the part of the minority member of the panel to furnish any type of estimate whatsoever to the majority members as to when the minority opinion to this high-priority case may be available.

EXHIBIT C

(FACSIMILE)

ORDER DUE
December 19, 1983

ORDER DENYING REHEARING

L.A. No. 31668

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

==========

SUPREME COURT
FILED
NOV 23 1983
LAWRENCE P. GILL, Clerk
/s/ RCM

CLEROW WILSON,
Petitioner

v.

THE SUPERIOR COURT OF THE COUNTY OF
LOS ANGELES, Respondent;

PEOPLE, Real Party in Interest

==========

Real Party in Interest's petition for rehearing DENIED.

/s/ Bird
Chief Justice

DECLARATION OF SERVICE ON THE COURT

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

The undersigned, Roderick W. Leonard, Deputy District Attorney, is a member of the bar of this Court. On January 21, 1984, I placed in the United States mail, via U. S. Postal Service Express mail, with postage prepaid, a box containing forty copies of the instant brief and appendices thereto accompanied by an entry of appearance addressed as follows:

Office of the Clerk
United States Supreme Court
Number 1 First Street, N. E.
Washington DC 20543

The instant Petition for Writ of Certiorari and appendices were thus mailed on January 21, 1984 which is within the permitted time.

_____

RODERICK W. LEONARD

2GCR

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Officer of the District Attorney of Los Angeles County, and a member of the bar of this Court, with principal offices located at 849 South Broadway, Los Angeles, California 90014-3570; that the District Attorney is the Petitioner in the above-entitled matter. On January 21, 1984, I served three copies of the foregoing

on the following persons and Court by depositing true copies thereof, enclosed in a sealed envelope with first class postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

CALIFORNIA SUPREME COURT
3580 WILSHIRE BLVD.
ROOM 213
LOS ANGELES CA 90010

ATTORNEY GENERAL'S OFFICE
3580 WILSHIRE BLVD.
LOS ANGELES CA 90010

PAUL F. MOORE II, ESQ.
2049 CENTURY PARK EAST
SUITE 3430
LOS ANGELES CA 90067

COURT OF APPEAL
SECOND APPELLATE DISTRICT
3580 WILSHIRE BLVD.
LOS ANGELES CA 90010

HON. EDWARD A. HINZ
SUPERIOR COURT JUDGE
825 MAPLE AVENUE
TORRANCE CA 90503

COUNTY COUNSEL
648 HALL OF ADMINISTRATION
500 W. TEMPLE ST.
LOS ANGELES CA 90012

RODERICK W. LEONARD

No. A-544

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

83-1222

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CLEROW WILSON,

Respondent.

APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

349 South Broadway, 11th Floor
Los Angeles, California 90014-3570
Telephone: 974-5922

Attorney for Petitioner

No. 83-1222

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Petitioner,

v.

CLEROW WILSON,

Respondent.

APPLICATION FOR STAY OF
ENFORCEMENT OF JUDGMENT

TO THE HONORABLE SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE SIXTH CIRCUIT:

Pursuant to Rule 44, rules of the Supreme Court of the United States, petitioner, the People of the State of California, respectfully request that an order be entered staying enforcement of the judgment of the California Supreme Court in Wilson v. Superior Court (The People, Real Party in Interest) (1983) 34 Cal.3d 777. In support of this application, petitioner, the People of the State of California, respectfully shows as follows:

1. On March 10, 1981 respondent Clerow Wilson, aka Flip Wilson, was arrested at the Los Angeles International Airport and charged with possession of illegal narcotics in violation of California Health and Safety Code sections 11350(a) and 11357(a). In due course, the respondent, Clerow Wilson, made a motion to

suppress the seized evidence, pursuant to California Penal Code section 1538.5. Said motion was denied by the trial court on October 30, 1981.

2. Thereafter, respondent Clerow Wilson filed an Alternate Writ of Mandate and Prohibition in the Court of Appeal of the State of California, Second Appellate District, Division One. On August 20, 1982 said court, in a split decision, which was certified for publication, denied the Peremptory Writ of Mandate and held that the police conduct was lawful under authority of both the United States Constitution and the Constitution of California. A copy of the opinion of the Court of Appeal is annexed as Exhibit B in the Petition for Writ of Certiorari in the above-entitled case, A83-1222 which has been filed with this Court.

3. Respondent Clerow Wilson then petitioned for hearing to the California Supreme Court which, on October 30, 1983 in a unanimous opinion, held that the seizure of the narcotics violated the Fourth Amendment of the United States Constitution and ordered that a Peremptory Writ issue directing the trial court to vacate its order suppressing the evidence and denying the motion to suppress and to enter a new order granting the motion. A copy of the opinion of the California Supreme Court is annexed as Exhibit A in the Petition for Writ of Certiorari in the above-entitled case 83-1222 which has been filed with this Court.

4. A Petition for Rehearing in the California Supreme Court, filed by the People of the State of California, was denied on November 28, 1983. A copy of the order denying the rehearing is attached hereto as Exhibit A.

5. The Application to the California Supreme Court for Stay of Issuance of the Peremptory Writ, filed by the People of the State of California, was denied on December 21, 1983. A copy of the order denying the Stay is attached hereto as Exhibit B.

6. On January 7, 1984 a Application for Stay of Enforcement of Judgment (Number A544, addressed to Honorable William H. Rehnquist, Associate Justice of the United States

Supreme Court) was received by this Court. A copy of that Application for Stay of Enforcement of Judgment is attached hereto as Exhibit C.

7. On January 10, 1984 the Application for Stay directed to Justice Rehnquist was denied. A copy of the letter informing Petitioner of that decision is attached hereto as Exhibit D.

8. Thereafter Petitioner filed and on January 21, 1984 this Court docketed the Petition for Writ of Certiorari Number 83-1222 in the above case. A copy of the letter notifying Petitioner of the docketing is attached as Exhibit E.

9. On or about February 22, 1984 Respondent filed a Brief in Opposition to the Petition for Writ of Certiorari.

10. The case is presently set for trial on April 10, 1984 in the Superior Court of the State of California for the County of Los Angeles, Southwest Judicial District, Department K (Case Number A198316). Petitioner believes that the Respondent will seek to force the matter to trial on that date. It is further believed that unless this Court issues a stay in the above-entitled matter the Superior Court will commence trial in the instant case on or about April 10, 1984.

11. Reasons for Seeking Certiorari

The Question Presented for Review, Statement of the Case, and Reason for Granting a Petition for Certiorari are fully set forth in the Petition for Writ of Certiorari which has been filed with this Court. Briefly, however, the facts and law in the instant case are summarized below:

Facts

This case involves an airport search whereby a police officer, acting upon information which did not provide probable cause for a detention, approached the respondent, asked if he "might have a moment of his time", and upon receiving an affirmative response advised respondent that he was conducting a narcotics investigation, had received information that respondent

would be arriving from Florida carrying a lot of drugs, and asked consent to search respondent's luggage. Consent was given and narcotics were found in respondent's attache case.

The Law

The California Supreme Court held that under the Fourth Amendment the police conduct was improper and the narcotics were to be suppressed (id., 34 Cal.3d at 791-792). It is the position of petitioner that the California Supreme Court incorrectly interpreted the scope of the Fourth Amendment. Specifically it is contended that, contrary to the decision of the California Supreme Court, the opinions of the United States Supreme Court in Florida v. Royer (1983) ___ U.S. ___ 103 S.Ct. 1319; 75 L.Ed.2d 229, United States v. Mendenhall (1980) 446 U.S. 544; 100 S.Ct. 1870, 64 L.Ed.2d 497 and Reid v. Georgia (1980) 448 U.S. 438, 65 L.Ed.2d 890, 100 S.Ct. 2752 permit a police officer, without probable cause, to approach an individual, identify himself/herself as a police officer, ask for a moment of the person's time and further inform the individual that he/she is conducting a narcotics investigation and has information that the person would be carrying a lot of drugs, and obtain valid consent to search incident to the request.

12. Irreparable Injury to Petitioner

Unless a stay of enforcement of the issuance of the Peremptory Writ is granted, and the judgment of the California Supreme Court is stayed, the case will be forced to trial thereby rendering any decision by the United States Supreme Court moot. Petitioner believes that the Superior Court will not allow another continuance in this matter and that Respondent will force the matter to trial. The prior Application for Stay of Enforcement of Judgment was made and denied by Justice Rehnquist this Court before the filing in this Court of the Petition for Writ of Certiorari and before the filing of Respondent's Brief in Opposition. Petitioner has been informed by a Clerk of the United States Supreme Court that the instant case had once been docketed for conference but no action was taken and the matter is again pending conference before this Court. Petitioner will be

DA-809-A-76T572D-4/76

prejudiced when this case goes to trial on or about April 10, 1984 and this Court has not considered nor ruled upon the important federal constitutional issues presented herein.

WHEREFORE, petitioner respectfully requests that the issuance of the Peremptory Writ and the enforcement of the judgment in the case of Wilson v. Supreme Court (1983) 34 Cal.3d 777, be stayed pending final determination of this matter by the United States Supreme Court.

Respectfully submitted,

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for Petitioner

mn

DA-809-A-76T572D-4/76

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, under the supervision of Roderick W. Leonard, Deputy District Attorney, a member of the bar of this court at whose direction the service was made, with principal offices located at 849 South Broadway, Los Angeles, California 9014-3570; that the District Attorney of Los Angeles County is the Petitioner in the above-entitled matter. On January 5, 1984, I served one copy of the foregoing on the following persons and courts by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

CALIFORNIA SUPREME COURT
3580 WILSHIRE BLVD.
ROOM 213
LOS ANGELES CA 90010

COURT OF APPEAL
SECOND APPELLATE DISTRICT
3580 WILSHIRE BLVD.
LOS ANGELES CA 90010

ATTORNEY GENERAL'S OFFICE
3580 WILSHIRE BLVD.
LOS ANGELES CA 90010

HON. EDWARD A. HINZ
SUPERIOR COURT JUDGE
825 MAPLE AVENUE
TORRANCE CA 90503

PAUL F. MOORE II
2049 CENTURY PARK EAST
SUITE 3430
LOS ANGELES CA 90067

Executed on April 3, 1984 at Los Angeles, California.

MARK NAGAI

DEC 1 1983

ORDER DUE
December 19, 1983

ORDER DENYING REHEARING

L.A. No. 31668

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
NOV 30 1983
CLERK

CLEROW WILSON,
Petitioner

v.

THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent;

PEOPLE, Real Party in Interest

Real Party in Interest's petition for rehearing DENIED.

Bird
Chief Justice

SUPREME COURT
FILED
DEC 21 1983
LAURENCE P. GILL, Clerk
Deputy

L.A. No. 31668

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CLEROW WILSON, Petitioner

v.

THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent;

PEOPLE, Real Party in Interest

The application for stay of issuance of the peremptory writ herein, is DENIED.

Bird

Chief Justice

FILE COPY

No. 7-574

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

RECEIVED
JAN 7 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

CLEROW WILSON,

Respondent.

APPLICATION FOR STAY OF ENFORCEMENT OF JUDGMENT

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

849 South Broadway, 11th Floor
Los Angeles, California 90014-3570
Telephone: (213) 974-5922

Attorney for Petitioner

TABLE OF AUTHORITIES

Cases	Pages
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1983

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Petitioner,

v.

CLEROW WILSON,

Respondent.

APPLICATION FOR STAY OF
ENFORCEMENT OF JUDGMENT

TO THE HONORABLE WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rule 44, rules of the Supreme Court of the United States, petitioner, the People of the State of California, respectfully request that an order be entered staying enforcement of the judgment of the California Supreme Court in Wilson v. Superior Court (The People, Real Party in Interest) (1983) 34 Cal.3d 777, pending the filing of a petition for certiorari and a final determination by the United States Supreme Court. In support of this application, petitioner, the People of the State of California, respectfully shows as follows:

1. On March 10, 1981 respondent Clerow Wilson, aka Flip Wilson, was arrested at the Los Angeles International Airport and charged with possession of illegal narcotics in violation of California Health and Safety Code sections 11350(a) and 11357(a). In due course, the respondent, Clerow Wilson, made a motion to

suppress the seized evidence, pursuant to California Penal Code section 1538.5 said motion was denied by the trial court on October 30, 1981.

2. Thereafter, respondent Clerow Wilson filed an Alternate Writ of Mandate and Prohibition in the Court of Appeal of the State of California, Second Appellate District, Division One. On August 26, 1982 said court, in a split decision, which was certified for publication, denied the Peremptory Writ of Mandate.

3. Respondent Clerow Wilson then petitioned for hearing to the California Supreme Court which, on October 30, 1983 in a unanimous opinion, held that the seizure of the narcotics violated the Fourth Amendment of the United States Constitution and ordered that a Peremptory Writ issue directing the trial court to vacate its order suppressing the evidence and denying the motion to suppress and to enter a new order granting the motion. A copy of the opinion of the California Supreme Court is attached hereto as Exhibit A.

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5. The Application to the California Supreme Court for Stay of Issuance of the Peremptory Writ, filed by the People of the State of California, was denied on December 21, 1983. A copy of the order denying the Stay is attached hereto as Exhibit C.

6. Reasons for Seeking Certiorari

Facts

This case involves an airport search whereby a police officer, acting upon information which did not provide probable cause for a detention, approached the respondent, asked if he "might have a moment of his time", and upon receiving an affirmative response advised respondent that he was conducting a narcotics investigation, had received information that respondent would be arriving from Florida carrying a lot of drugs, and asked consent to search respondent's luggage. Consent was given and

DA-880-A-78T?7?D-4/78

narcotics were found in respondent's attache case.

The Law

The California Supreme Court held that under the Fourth Amendment the police conduct was improper and the narcotics were to be suppressed (id., 34 Cal.3d at 791-792). It is the position of petitioner that the California Supreme Court incorrectly interpreted the scope of the Fourth Amendment. Specifically it is contended that contrary to the decision of the California Supreme Court, the opinions of the United States Supreme Court in Florida v. Royer (1983) ___ U.S. ___ 103 S.Ct. 1319; 75 L.Ed.2d 229, United States v. Mendenhall (1980) 446 U.S. 544; 100 S.Ct. 1870, 64 L.Ed.2d 497 and Reid v. Georgia (1980) 448 U.S. 438, 65 L.Ed.2d 890, 100 S.Ct. 2752 permit a police officer, without probable cause, to approach an individual, identify himself/herself as a police officer, ask for a moment of the person's time and further inform the individual that he/she is conducting a narcotics investigation and has information that the person would be carrying a lot of drugs, and obtain valid consent to search incident to the request.

7. Irreparable Injury to Petitioner

Unless a stay of enforcement of the issuance of the Peremptory Writ is granted, and the judgment of the California Supreme Court is stayed, the case may go to trial and render any decision by the United States Supreme Court moot. Petitioner will thereby be prejudiced in that important federal constitutional issues presented in this case and decided adversely to petitioner by the California Supreme Court will not be determined by the United States Supreme Court which has the ultimate jurisdiction of federal constitutional dimension.

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DA-809-A-76T372D-4/76

WHEREFORE, petitioner respectfully requests that the issuance of the Peremptory Writ and the enforcement of the judgment in the case of Wilson v. Supreme Court (1983) 34 Cal.3d 777, be stayed pending filing of a Writ of Certiorari and a final determination of this matter by the United States Supreme Court.

Respectfully submitted,

ROBERT H. PHILIBOSIAN
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Attorney for Petitioner

mn

DA-809-A-76T372D-4/76

DECLARATION OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, the undersigned, hereby declare under penalty of perjury, that the following is true and correct:

I am a citizen of the United States, over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles County, under the supervision of Roderick W. Leonard, Deputy District Attorney, a member of the bar of this court at whose direction the service was made, with principal offices located at 849 South Broadway, Los Angeles, California 9014-3570; that the District Attorney of Los Angeles County is the Petitioner in the above-entitled matter. On January 5, 1984, I served one copy of the foregoing on the following persons and courts by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the City of Los Angeles in compliance with Supreme Court Rule 28, paragraph three, addressed as follows:

CALIFORNIA SUPREME COURT
3580 WILSHIRE BLVD.
ROOM 213
LOS ANGELES CA 90010

COURT OF APPEAL
SECOND APPELLATE DISTRICT
3580 WILSHIRE BLVD.
LOS ANGELES CA 90010

ATTORNEY GENERAL'S OFFICE
3580 WILSHIRE BLVD.
LOS ANGELES CA 90010

HON. EDWARD A. HINZ
SUPERIOR COURT JUDGE
825 MAPLE AVENUE
TORRANCE CA 90503

PAUL F. MOORE II
2049 CENTURY PARK EAST
SUITE 3430
LOS ANGELES CA 90067

Executed on January 5, 1984 at Los Angeles, California.

MARK NAGAI

EXHIBIT A

SUMMARY

In a prosecution arising out of the discovery of narcotics in defendant's attache case, the trial court denied defendant's motion to suppress the evidence. Police officers had observed defendant with a companion at an airport arriving on a flight from Miami, Florida. Defendant's companion made "eye contact" with one of the officers. The officer stated that this was consistent with the behavior of persons he had arrested for transporting narcotics. The officers followed defendant and his companion out of the airport to defendant's car. One of the officers approached defendant, identified himself and asked defendant if he might have a moment of his time. Defendant assented. The officer then advised defendant that he was conducting a narcotics investigation, and that he had information defendant would be arriving from Florida with a lot of drugs. Thereafter, defendant permitted the officer to search the attache case in which the

officer found a bottle of hashish oil. The officer then arrested defendant, continued the search and found a small glass vial containing a substance resembling cocaine.

The Supreme Court granted a peremptory writ of mandate directing the trial court to vacate its order denying the motion to suppress and to enter a new order granting the motion. The court held that, as a matter of law, the police did not have an objective, articulable basis to justify a detention of defendant. The court also held that defendant was detained, within the meaning of the Fourth Amendment, when he consented to the search of his attache case. Accordingly, the court held that the police detained defendant in violation of U.S. Const., 4th Amend., and that the trial court erred in failing to suppress the evidence obtained as a result of that illegal detention. (Opinion by Kaus, J., expressing the unanimous view of the court.)

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HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1a-1c) Searches and Seizures § 21—Constitutional and Statutory Provisions—Waiver of Protections—Consent—Person Detained by Police.—Evidence obtained by a police officer in a search of a suspect's attache case was obtained in violation of U.S. Const., 14th Amend.; and should have been suppressed by the trial court, though the suspect gave his consent to the search, where he was illegally detained. As a matter of law, the officer did not have an objective, articulable basis to justify his detention—the officer had observed him at an airport with a companion arriving from Miami, Florida, and had followed him to his car. Apart from the fact his companion made brief eye contact with the officer, he did not identify any circumstances which would have provided a reasonable basis for distinguishing him from the great bulk of passengers arriving at the airport. And, although the officer did not detain him for federal constitutional purposes merely by approaching him, identifying himself, and asking if he might have a moment of his time, he was detained when the officer advised him that he was conducting a narcotics investigation and had received information that he would be arriving from Florida with a lot of drugs. Under the circumstances, no reasonable person in the suspect's position would have believed he was free to leave without complying with the officer's request.

(2) Arrest § 2—Definitions and Distinctions—"Consensual Encounters," "Detentions," and Formal Arrests.—For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police "contacts" or "interactions" with individuals, ranging from the least to the most intrusive. First, there are "consensual encounters," which are those police-individual interactions which result in no restraint of an individual's liberty whatsoever—i.e., no "seizure," however minimal—and which may be properly initiated by police officers even if they lack any "objective justification." Second, there are "detentions," seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police if there is an articulable suspicion that a person has committed or is about to commit a crime. Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime.

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(3) Arrest § 2—Definitions and Distinc-

tions—"Seized."—A person has been "seized" (i.e., detained) within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

[See Cal.Jur.3d, Criminal Law, § 285; Am.Jur.2d, Arrest, § 1.]

COUNSEL

Paul F. Moore II and Thomas P. Allen III for Petitioner.

Quin Denvir, State Public Defender, Charles M. Sevilla, Chief Deputy State Public Defender, Kenneth M. Wells, Public Defender (Sacramento), Everett J. Avila, Assistant Public Defender, James J. Brosnahan, Christine Hall, Karen Snell, Doron Weinberg, Timothy Brosnan, Margaret C. Crosby, Alan L. Schlosser, Amitai Schwartz and Fred Okrand as Amici Curiae on behalf of Petitioner.

No appearance for Respondent.

Robert H. Philibosian and John K. Van de Kamp, District Attorneys, Harry B. Sondheim, Donald J. Kaplan, Richard W. Gerry, Suzanne Person and Roderick W. Leonard, Deputy District Attorneys, for Real Party in Interest.

John K. Van de Kamp and George Deukmejian, Attorneys General, Daniel J. Kremer and Robert H. Philibosian, Chief Assistant Attorneys General, S. Clark Moore, Assistant Attorney General, Edward T. Fogel, Jr., Shunji Asari, Norman H. Sokolow and Howard J. Schwab, Deputy Attorneys General, and Christopher N. Heard as Amici Curiae on behalf of Real Party in Interest.

OPINION

KAUS, J.—In this writ proceeding, Clarow (Flip) Wilson seeks review of a trial court ruling which denied his motion to suppress evidence obtained as a result of police activity at the Los Angeles International Airport. (Pen. Code, § 1538.5, subd. (i).) Wilson contends that the police conduct in question violated the search and seizure provisions of both the federal and state Constitutions and that the evidence should therefore be excluded from his

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impending trial. In response, the People maintain (1) that the police action was proper under both federal and state standards and (2) that even if the conduct violated state search and seizure principles, the evidence may not be excluded on that basis in light of article I, section 28, subdivision (d) of the California Constitution, the so-called "Truth-in-Evidence" provision enacted as part of an initiative measure—Proposition 8—adopted at the June 1982 election.

As explained, we conclude that the evidence at issue was obtained in violation of the federal Constitution and must be suppressed on that basis. Accordingly, we need not reach the other issues raised by the parties.

I

At the hearing on the motion to suppress, the arresting officer, Detective Roi Kaiser, and Wilson each testified to the events leading up to the discovery of the challenged evidence. Although the two agreed on a number of general facts surrounding the discovery, their testimony conflicted sharply with respect to many important details. Since the trial court resolved this matter in favor of the prosecution, for purposes of this proceeding we view the record in the light most favorable to the People's position. In the interest of completeness, however, we note the main points of conflict shown by the record.

At the time of the events in question—March 10, 1981—Detective Kaiser, a Los Angeles police officer, had been working as an undercover narcotics agent at the Los Angeles International Airport for four and a half years, monitoring inbound flights from Florida in an attempt to discover persons transporting narcotics into California. Kaiser testified that about 11:30 a.m. on that day, he and his partner, Deputy Gary Frederick—who was also in

plain clothes—went to the Pan American Airlines arrival area to monitor the arrival of a flight from Miami. As the passengers left the plane and entered the terminal, Kaiser saw Wilson with another man, later identified as Wilson's nephew, Rashon. Kaiser testified that he was not expecting to see Wilson arrive on that flight, but that he recognized him from his television appearances. Wilson was carrying an attache case and Rashon was carrying a box bearing the name "Flip Wilson." Kaiser testified that he noticed nothing unusual about these items.

As Kaiser watched, both Wilson and Rashon looked around the waiting area. Kaiser stated that at this time he observed nothing unusual about Wilson, but that Rashon made "eye contact" with him on two occasions, an occurrence which was consistent with the behavior of persons he had arrested in the past for transporting narcotics. Although acknowledging that

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Rashon could have simply been looking for someone who was meeting the plane, Kaiser testified that it did not appear that way to him. He conceded, however, that he could not articulate any objective basis for differentiating the "eye contact" of drug couriers from that of other persons.

As Wilson and Rashon walked at a normal pace from the arrival area down a concourse to the street, Kaiser followed about 10 feet behind. Midway down the 200-foot concourse, Rashon turned his head back in Kaiser's general direction and immediately turned back to speak to Wilson, who then also turned his head back in the general direction of Kaiser. Neither man made eye contact with Kaiser at this time.

At the end of the concourse, Wilson and Rashon were met by Wilson's wife and all three walked outside to Wilson's car which was parked at the curb. Rashon handed the box he was carrying to Wilson, who put it and the attache case in the rear seat of the passenger compartment. Rashon then went to the baggage claim area to retrieve their luggage.

A few minutes later, as Rashon left the baggage claim area with two pieces of luggage, Kaiser and Frederick approached him. Frederick identified himself as a police officer and had a brief conversation with Rashon which Kaiser apparently did not overhear.

Kaiser then approached Wilson, who—according to Kaiser—was then standing at the open trunk of the car.[1] Kaiser testified that at that point he "had a slight suspicion" that Wilson "possibly" was involved in criminal activity, and that his purpose in speaking to Wilson was to request permission to search his luggage. Kaiser stated that as he reached Wilson, he displayed his police identification, told him that he was a police officer and asked if he "might have a minute of his time." When Wilson responded, "Sure," Kaiser testified that "I advised Mr. Wilson that I was conducting a narcotics investigation, *and that we had received information that he would be arriving today from Florida carrying a lot of drugs.*" (Italics added.)[2]

On cross-examination, Kaiser disclosed that he had obtained the information to which he referred from his partner, Frederick, who, in turn, had learned of it from another person. On defense counsel's motion, the court ruled that if the People intended to rely on such information to justify the

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officer's actions, Frederick would be required to testify as to the nature and source of the information. (See, e.g., *People* v. *Madden* (1970) 2 Cal.3d 1017, 1021 [88 Cal.Rptr. 171, 471 P.2d 971]; *Remers* v. *Superior Court* (1970) 2 Cal.3d 659, 666-667 [87 Cal.Rptr. 202, 470 P.2d 11]; *People* v. *Harvey* (1958) 156 Cal.App.2d 516, 523-524 [319 P.2d 689] (conc. opn. of Dooling, J. and Draper, J.).) When the People indicated that they did not intend to call Frederick as a witness, the court held that the prosecution could not rely on such information to support the validity of the police conduct. The People have not chal-

[1]Wilson testified that when Kaiser first approached him, he was seated in the driver's seat of the car and Kaiser leaned in through an open rear door.

[2]According to Wilson, Kaiser "stated that he had received a call from a young black man saying that I would be arriving, and that I would be carrying a large quantity of narcotics."

lenged that ruling in this proceeding.[3]

After having told Wilson that he had information that Wilson was carrying "a lot of drugs," Kaiser asked if he could search the two pieces of luggage that Rashon had just set on the curb and the box which had been placed inside the car. Wilson allegedly responded, "Sure, I don't have any drugs that I know of. Go ahead and search."[4] When Kaiser went to the rear passenger seat, he saw the attache case and asked Wilson for permission to search it. Kaiser testified that Wilson then said: "There should only be some papers in there, but you can go ahead and look, if you'd like."[5]

Wilson then placed the case on the rear seat and opened it. Kaiser searched through the case and retrieved a glass vial from a pocket on the inside of the lid of the case. At that point, Wilson allegedly stated: "That's just a little bit of hash oil in there."

After examining the bottle and concluding that it did contain hash oil, Kaiser asked Wilson "if he would mind accompanying me back to the nar-

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cotics office situated at the airport . . . ." Kaiser testified that at that point Wilson was actually under arrest, although Kaiser had not so informed him. Wilson asked if they could drive to the office in his car so he could remove it from the street, and Kaiser agreed. At the office, Kaiser continued his search of the luggage and found another small glass vial, containing a substance resembling cocaine, inside an eyeglass case in another pocket of the attache case. Wilson was then formally placed under arrest and taken into custody.

At the conclusion of the suppression hearing, defense counsel argued that Wilson's testimony indicated that he had not voluntarily consented to the search as Kaiser claimed, but that even if Kaiser's version of the events was accepted in full, the evidence should still be suppressed because Kaiser's testimony itself established that Wilson had been detained without adequate justification when the claimed consent was given. Defense counsel relied on both federal and state authorities to support his illegal detention claim, though he emphasized the more recent state precedents. In denying the motion, the trial court stated: "The court is of the view, that, one, this was not a detention; that the information—conduct of the officer was sufficient to justify the approach of a citizen on the street in asking to talk to him with the subsequent items that developed. [¶] Now, it may be that the court has the wrong view of the law in respect to that; but my reading of Tony C. [*In re Tony C.* (1978) 21 Cal.3d 888] and the cases that follow it are such that the court has made the ruling that it has."

In this proceeding, Wilson challenges the trial court ruling on two alternative grounds, maintaining that the court's conclusion is inconsistent with (1) the line of California decisions emanating from this court's opinion in *Tony C.*, and (2) recent decisions of the United States Supreme Court applying federal Fourth

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[3]A question was raised at oral argument as to whether the trial court's ruling on the so-called *Harvey/Madden* issue was consistent with federal, as well as state, law. The parties have not provided any relevant authorities on the question, and inasmuch as the People did not raise any objection to the ruling either at the suppression hearing or in any of their papers filed in this proceeding, we have no occasion to address this academically intriguing question in this case. (Cf. *People v. Rogers* (1978) 21 Cal.3d 542, 547-548 [146 Cal.Rptr. 732, 579 P.2d 1048] (defendant may not raise *Harvey/Madden* issue on appeal where point not properly preserved).)

[4]Wilson testified that when he was first approached by Kaiser, the officer informed him that he had a search warrant for his luggage. Wilson stated that because he had an important engagement and was very pressed for time, he told his nephew to cooperate with the search of the luggage.

[5]Wilson testified that when Kaiser requested permission to search the attache case, the following colloquy occurred: "I said, 'I would prefer that you didn't.' [¶] And he said, 'Are you telling me that I cannot search the attache case?' [¶] I said, 'I would prefer that you didn't.' [¶] He said, 'Are you refusing to allow me to search the attache case?' [¶] And I said, 'Sir, I am telling you that I would prefer that you didn't.' [¶] And he said, 'I am not concerned if you're carrying just a small stash for your personal use. I'm only concerned with a large quantity.' [¶] And he said, 'I've been to Hollywood parties where they had cocaine on the tables by bowls, and I did not make arrests.' . . . So then I— . . . I said, 'Since you put it on those terms, okay.' [¶] So I turned around in the seat, and I leaned over the back of the driver's seat, and I opened the attache case and I raised the lid."

Amendment principles in similar airport-search settings. Since we conclude that Wilson's federal constitutional claim is dispositive, we address only that issue.

II

A.

Wilson concedes that the trial court could find on the basis of Kaiser's testimony that he consented to the search of his attache case, a search which disclosed the vial of hash oil and resulted in his arrest. (1a) He contends, however, that even if Kaiser's testimony is accepted at face value, the evidence presented at the hearing demonstrates, as a matter of law, that at the time he consented to the search he was under an illegal detention in violation of the Fourth Amendment. Accordingly, he maintains that the evidence

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obtained as a result of that consent must be suppressed as a fruit of an illegal detention. In support of his claim, Wilson relies on two recent decisions of the United States Supreme Court involving similar airport searches and seizures, *Reid* v. *Georgia* (1980) 448 U.S. 438 [65 L.Ed.2d 890, 100 S.Ct. 2752] and the court's very recent decision in *Florida* v. *Royer* (1983) — U.S. — [75 L.Ed.2d 229, 103 S.Ct. 1319]. As we explain, we conclude that *Reid* and *Royer* do support Wilson's claim.

In analyzing the federal constitutional issue, Justice White's lead opinion in *Royer* provides a logical starting point.[4] In that opinion, Justice White reviewed the general Fourth Amendment framework that governs the kind of warrantless, investigatory activities that are frequently undertaken by law enforcement officers in an airport setting. (— U.S. at p. — [75 L.Ed.2d at pp. 233-239, 103 S.Ct. at pp. 1323-1326].) (2) For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police "contacts" or "interactions" with individuals, ranging from the least to the most intrusive. First, there are what Justice White termed "consensual encounters" (*id.* — U.S. at p. — [75 L.Ed.2d at p. 243, 103 S.Ct. at p. 1329]), which are those police-individual interactions which result in no restraint of an individual's liberty whatsoever—i.e., no "seizure," however minimal—and which may properly be initiated by police officers even if they lack any "objective justification." (*Id.* — U.S. at p. — [75 L.Ed.2d at p. 236, 103 S.Ct. at p. 1324].) Second, there are what are commonly termed "detentions;" seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police "if there is an articulable suspicion that a person has committed or is about to commit a crime." (*Ibid.*) Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual's liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime. (*Id.* — U.S. at p. — [75 L.Ed.2d at p. 237, 103 S.Ct. at p. 1325].)

In this case, Wilson makes no claim that at the time he consented to the search of his attache case he was subjected to restraints which exceeded the

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permissible bounds of a detention. (1b) Thus, the principal question before us is simply whether the police conduct which preceded Wilson's consent involved only a "consensual encounter" which the police could undertake without objective justification, or whether it amounted to a "detention" which would be permissible only if the police had an objective, articulable basis for suspecting Wilson of

[4] In *Royer*, four judges—Justices White, Marshall, Powell and Stevens—joined in Justice White's lead opinion, which reversed Royer's conviction on the ground that his consent to search his luggage had been obtained as the result of an illegal seizure which exceeded the bounds of a permissible detention. Justice Brennan filed a separate opinion, concurring in the result but disagreeing with some of the reasoning of the lead opinion. The four other judges dissented, with Justice Rehnquist writing a dissenting opinion joined by Chief Justice Burger and Justice O'Connor, and Justice Blackmun writing his own separate dissent.

Although the judges were widely split on the application of federal constitutional principles to the facts of *Royer*, a close reading of the various opinions suggests that the court is in general agreement as to the overall Fourth Amendment framework summarized in Justice White's lead opinion.

criminal conduct. In this regard, Wilson contends that the record establishes, as a matter of law, that (1) the prosecution failed to prove the requisite "objective articulable suspicion" to justify a detention, and (2) he was, in fact, "detained." We turn first to the "articulable suspicion" issue.

B.

As we have seen, at the suppression hearing Detective Kaiser described in considerable detail his observations of Wilson and Rashon which preceded his direct contact with Wilson. Of the facts related by Kaiser, the only two circumstances that might even plausibly be proffered as a basis of an "articulable suspicion" are (1) Rashon's "eye contact" with Kaiser upon first entering the arrival area of the terminal, and (2) the fact that both Rashon and Wilson looked back in Kaiser's general direction as they walked down the concourse toward the airport terminal exit. Wilson contends that these circumstances, singly or in combination, do not rise to the level of an "objective, articulable suspicion" so as to justify even a limited detention under Fourth Amendment principles.

The United States Supreme Court's decision in *Reid* v. *Georgia*, *supra*, while arising out of different facts, directly supports Wilson's claim. In *Reid*, an undercover narcotics agent at the Atlanta airport observed the defendant as he arrived on an early morning flight from Fort Lauderdale. As the passengers left the plane and walked down the airport concourse single file, the agent saw the defendant occasionally look back at a second passenger who was separated from him by several other passengers. When the passengers reached the main lobby of the terminal, the second man caught up with the defendant, the two talked briefly, and they then left the terminal together.

The agent approached the two men outside the building, identified himself as a narcotics agent and asked to see their airline ticket and identification. The men complied with the request. The tickets revealed that they had both been bought with defendant's credit card and that the two men had been in Fort Lauderdale for only one day. At this point, the men appeared nervous and the agent asked if they would agree to return to the terminal and consent to a search of their persons and their bags. The agent testified that the two agreed, but, as they returned inside the building, the defendant ran, dis-

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carding his bag. He was quickly apprehended and the bag turned out to contain cocaine.

On these facts, the Georgia Court of Appeal, relying on the agent's testimony that the defendant appeared to fit the airport's "drug courier profile" in a number of respects, held that the officer had "reasonable suspicion" to approach and detain the two men outside the terminal building. Specifically, the Georgia court found it relevant that "(1) the [defendant] had arrived from Fort Lauderdale, which the agent testified is the principal place of origin of cocaine sold elsewhere in the country, (2) the [defendant] arrived in the early morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags." (448 U.S. at p. 441 [65 L.Ed.2d at p. 894].)

In *Reid*, the United States Supreme Court reversed the Georgia decision, concluding "that the agent could not, as a matter of law, have reasonably suspected the [defendant] of criminal activity on the basis of these observed circumstances." (*Ibid.*) The court reasoned: "Of the evidence relied on, only the fact that the [defendant] preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure. Nor can we agree, on this record, that the manner in which the [defendant] and his companion walked through the airport reasonably could have led the agent to suspect them of wrongdoing. Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, [citation], this is not such a case. The agent's belief that the [defendant] and his com-

panion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and unparticularized suspicion or "hunch"' [citation], than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case." (*Ibid.*)

This reasoning applies equally to the present case. Indeed, the facts before us appear, if anything, even less suspicious than those in *Reid*. Aside from the brief "eye contact" with Rashon—a reed at least as "slender" as the agent's suspicion in *Reid*—the officer did not identify any circumstance which would provide a reasonable basis for distinguishing Wilson from the great bulk of passengers arriving at the Los Angeles International Airport. Thus, on this record, we conclude as a matter of law that the police did not have an objective, articulable basis to justify a detention of Wilson. Accordingly, the determinative issue is whether at the time of his consent Wilson was "detained" for Fourth Amendment purposes or whether he was simply engaged in a "consensual encounter."

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C.

Reid does not provide an answer to the detention issue. Although holding that the circumstances known to the officer before he approached the two suspects did not rise to the level of "articulable suspicion," the *Reid* court did not directly address the issue of whether the officer's conduct amounted to a "detention" of the suspects or, if it did, at what point the detention had begun: because the lower courts had concluded that there was reasonable suspicion to justify a detention, they had not found it necessary to decide whether or not the defendant had been detained; the Supreme Court—while reversing on the reasonable suspicion point—did not reach the detention question, leaving the initial resolution of that matter to the state courts on remand. (See *Reid, supra*, 448 U.S. at p. 441 [65 L.Ed.2d at p. 893] (conc. opn. of Powell, J.).)[7]

While *Reid* thus does not assist us in distinguishing "consensual encounters" from "detentions," the Supreme Court's recent decision in *Royer* does afford considerable guidance on this point. In *Royer*, two undercover narcotic agents working at the Miami airport testified that they first took note of Royer because they believed that his "appearance, mannerisms, luggage and actions fit the so-called 'drug courier profile.'" (— U.S. at p. — [75 L.Ed.2d at p. 233, 103 S.Ct. at p. 1322].) As they observed him, Royer purchased a one-way ticket to New York and checked his two suitcases, placing on each an identification tag with the name "Holt." As he walked along the concourse toward the airline boarding area, the two officers approached him, identified themselves as policemen working out of the sheriff's office, and asked him if he had a "moment" to speak with them. He said, "Yes."

At the officers' request, Royer produced his airline ticket and driver's license; the ticket—like the baggage identification tags—was made out in

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the name "Holt," while the driver's license carried his correct name, "Royer." When the officer asked about the discrepancy, Royer stated that a friend had made the reservation in the name "Holt." During this conversation,

[7]Similarly, in *United States* v. *Mendenhall* (1980) 446 U.S. 544 [64 L.Ed.2d 497, 100 S.Ct. 1870]—an airport search case decided just two weeks before *Reid*—the detention issue had not been litigated in the lower courts, apparently because the prosecution had never contended that the officers' conduct fell short of a detention. Therefore, seven judges of the Supreme Court resolved the case on the assumption that a detention had occurred. Of the seven, three—Justices Powell, Blackmun and the Chief Justice—found that there was sufficient articulable suspicion to justify a detention, and four—Justices White, Brennan, Marshall and Stevens—found that there was not. The two remaining judges—Justices Stewart and Rehnquist—concluded that the detention issue was not foreclosed despite the prosecution's failure to pursue it, and—without deciding the reasonable suspicion question—resolved the case in favor of the prosecution on the ground that no detention had occurred. As a result, the conviction in *Mendenhall* was affirmed by a five-to-four margin.

Royer became noticeably more nervous, and the officers then informed him "that they were in fact narcotics investigators and they had reason to suspect him of transporting narcotics." (*Ibid.*) At that point the officers, who still had Royer's airline ticket and identification, asked him to accompany them to a room adjacent to the concourse, about 40 feet away.

Without saying anything, Royer walked with the officers to the small room—described as a "large storage closet"—which contained a desk and two chairs. Without seeking Royer's consent, one of the officers retrieved the luggage which Royer had checked and brought it to the room. Royer then was asked if he would consent to a search of the suitcases. In response, Royer produced a key and unlocked one suitcase; an officer opened it and found a substantial quantity of marijuana. Royer then consented to the search of the second bag, in which, too, marijuana was found. The entire episode—from the time the officers first approached Royer to their discovery of the contraband—took about 15 minutes.

Before trial, Royer moved to suppress the evidence on Fourth Amendment grounds, the motion was denied and he was convicted of felony marijuana possession. On appeal, the Florida Court of Appeal reversed the conviction, holding (1) that the police did not even have sufficient information to constitute the articulable suspicion required to justify a limited detention and (2) that, in any event, the police conduct which preceded the consent exceeded the limited restraint permitted in a detention context. The state then appealed that decision to the United States Supreme Court.

In its decision in *Royer*, the high court disagreed with the Florida court on the "articulable suspicion" issue[8] but upheld the reversal of the conviction on the ground that the police had indeed exceeded the bounds of a limited detention—that, before he had consented to the search of his luggage, "[a]s a practical matter, Royer was under arrest." (— U.S. at p. — [75 L.Ed.2d at p. 240, 103 S.Ct. at p. 1327].) Although the ultimate holding in *Royer* thus turned on an issue—the line between a "detention" and an "arrest"—which is not involved in this case, the lead opinion in *Royer*

contains several passages which shed considerable light on the question which is at issue here—namely, the distinction between a "consensual encounter" and a "detention."[9]

First, in summarizing general Fourth Amendment principles, the lead opinion describes some of the more typical police actions that fall into the "consensual encounter" category. The opinion observes: "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. [Citations.] Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. [Citation.] The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. [Citations.] He may not

[8] In holding that there were articulable grounds for suspicion, the lead opinion in *Royer* stated: "We agree with the State that when the officers discovered that Royer was traveling under an assumed name, this fact, and the facts already known to the officers—paying cash for a one-way ticket, the mode of checking the two bags, and Royer's appearance and conduct in general—were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention." (— U.S. at p. — [75 L.Ed.2d at p. 239, 103 S.Ct. at p. 1326].)

[9] Although only four justices signed Justice White's lead opinion in *Royer*, Justice Blackmun, though dissenting on another issue, expressly signaled his general agreement with the lead opinion's analysis of the "consensual encounter"/"detention" issue. (— U.S. at pp. —— [75 L.Ed.2d at p. 246-247, 103 S.Ct. at pp. 1332-1333].) Moreover, in his concurring opinion, Justice Brennan indicated that he would take a *narrower* view of those police activities that constituted consensual encounters than that expressed in the lead opinion. (*Id.* — U.S. at pp. —— [75 L.Ed.2d at pp. 244-245, 103 S.Ct. at pp. 1330-1331].) Thus, it is evident that the lead opinion's views as to the *limits* on consensual encounters clearly enjoy majority support within the court.

be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. [Citation.] If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." (— U.S. at p. — [75 L.Ed.2d at p. 236, 103 S.Ct. at p. 1324].)

Though this passage gives some indication of the attributes of a consensual encounter, it does not in itself set forth a clear constitutional standard for distinguishing such an encounter from a detention. That additional guidance is provided in a subsequent passage, where the lead opinion, in rejecting the state's contention that the "entire encounter was consensual," states: "Asking for and examining Royer's ticket were no doubt permissible in themselves, but when the officers identified themselves as narcotic agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. *These circumstances surely amount to a show of official authority such that 'a reasonable person would have believed that he was not free to leave.'*

[34 Cal.3d 790]

United States v. *Mendenhall*, 446 U.S. 544, 554 (Opinion of Stewart, J.)." (Italics added.) (— U.S. at p. — [75 L.Ed.2d at p. 239, 103 S.Ct. at p. 1326].)

(3) In light of the emphasized language and the citation of *Mendenhall*, it is now clear that a substantial majority—and perhaps all—of the Supreme Court justices agree with the standard set forth by Justice Stewart in his separate opinion in that case: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[10] (*United States* v. *Mendenhall*, *supra*, 446 U.S. at p. 554 [64 L.Ed.2d at p. 509].) (1c) Thus, the question before us is whether, at the time Wilson consented to the search of his attache case, a reasonable person in Wilson's position would have believed that he was not free to leave.

Reviewing the facts of this case in light of this standard and the relevant portions of *Royer*, it is evident that Detective Kaiser did not detain Wilson, for federal constitutional purposes, merely by approaching him, identifying himself as a police officer, and asking if he might have a minute of his time. At that point, however, the officer did not simply ask Wilson if he would permit a search of his luggage. Instead, he advised Wilson that he was conducting a narcotics investigation and that he "had received information that he [Wilson] would be arriving today from Florida carrying *a lot of drugs*." (Italics added.)

Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer. Before Kaiser made that statement, Wilson might well have thought that the officer was simply pursuing routine, general investigatory activities, and might reasonably have felt free to explain to the officer that he had an important appointment to keep and did not have the time—or, perhaps, the inclination—to answer the officer's ques-

[34 Cal.3d 791]

tions or to comply with his requests for per-

[10]Six members of the present court have either authored or joined in opinions explicitly endorsing the *Mendenhall* standard. Justices White, Marshall, Powell and Stevens signed the lead opinion in *Royer*; Justice Blackmun expressly approved that standard in his dissent in *Royer* (— U.S. at p. — [75 L.Ed.2d at p. 246, 103 S.Ct. at p. 1332]); and Justice Rehnquist joined in the relevant portion of Justice Stewart's opinion in *Mendenhall* itself. Of the three remaining justices, Chief Justice Burger joined Justice Powell's concurring opinion in *Reid*, which—at the least—strongly hinted at its approval of the *Mendenhall* test (448 U.S. at p. 443 [65 L.Ed.2d at p. 895]), and Justice Brennan appears to have applied the *Mendenhall* standard in his discussion of the detention issue in his concurring opinion in *Royer*. (— U.S. at p. — [75 L.Ed.2d at p. 245, 103 S.Ct. at p. 1331].) Only Justice O'Connor, who was not on the court when *Mendenhall* and *Reid* were decided, has not indicated her views on the issue.

mission to search. Once the officer advised Wilson that he had information that Wilson was carrying a lot of drugs, the entire complexion of the encounter changed and Wilson could not help but understand that at that point he was the focus of the officer's particularized suspicion. Under these circumstances—and particularly in the absence of any clarifying advice from the officer explaining to Wilson that he was, in fact, free to drive away if he desired—no reasonable person would have believed that he was free to leave. (See *United States* v. *Berry* (5th Cir. 1982) 670 F.2d 583, 597; *United States* v. *Robinson* (5th Cir. 1980) 625 F.2d 1211, 1216-1217.)[11]

Accordingly, we conclude that Wilson was detained, within the meaning of the Fourth Amendment, when he consented to the search of his attache case. Of course, if—as Detective Kaiser represented—the police did in fact have additional information indicating that Wilson would be transporting narcotics, that information might well have provided a reasonable basis for the detention, in which case Wilson's consent would have been validly obtained. As we have explained, however, the prosecution—despite fair warning—failed to present the relevant testimony to substantiate the alleged information. On this record, we can only conclude that the police detained Wilson in violation of the Fourth Amendment, and that the trial court erred in failing to suppress the evidence obtained as a result of that illegal detention.[12]

[34 Cal.3d 792]

Let a peremptory writ of mandate issue, directing the trial court to vacate its order denying the motion to suppress and to enter a new order granting the motion.

Bird, C. J., Mosk, J., Richardson, J., Broussard, J., Reynoso, J., and Grodin, J., concurred.

[11]One commentator—in a thoughtful article on the general "seizure" question—has made this same point: "The nature of the questions asked by the officer during an encounter also may be relevant to the seizure issue. As questioning moves from general questioning concerning facts unrelated to a particular crime or class of crimes to questions indicating the officer's interest in a specific crime or class of crimes, the perception of the citizen reasonably may change from one of a voluntary encounter, from which he is free to disengage, to one of a formal police investigation of specific criminal activity, which he is not free to ignore: . . . In the absence of actual physical restraints or unequivocal verbal commands, a reasonable person examining the conduct of the officer is more likely to view the circumstances as a seizure when the conduct or verbal activities of the police become more intrusive, that is, when they clearly are related to the investigation of specific criminal acts. It is the threat of arrest and prosecution that produces the perception of restricted liberty in a police-citizen encounter, and that perception is more likely to arise when conduct of the police is linked to the investigation of specific criminal activity." (Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"* (1982) 43 Ohio St.L.J. 771, 795, 802.)

[12]Although the People have not expressly conceded the point, they have not argued that the evidence should not be suppressed even if Wilson was illegally detained, on the theory that the evidence was not the "product" of the illegal detention. Since Wilson's consent followed within minutes of the detention, and since there were no intervening circumstances whatsoever, such a claim would, in any event, be untenable. (See *Royer*, *supra*, — U.S. at p. — [75 L.Ed.2d at p. 239, 103 S.Ct. at p. 1326]; *Dunaway* v. *New York* (1979) 442 U.S. 200, 216-218 [60 L.Ed.2d 824, 838-839, 99 S.Ct. 2248]; *Brown* v. *Illinois* (1975) 422 U.S. 590, 601-605 [45 L.Ed.2d 416, 425-428, 95 S.Ct. 2254].)

EXHIBIT B

DEC 1 1983

ORDER DUE
December 19, 1983

ORDER DENYING REHEARING

L.A. No. 31668

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
NOV 28 1983
[illegible] Clerk

CLEROW WILSON,
Petitioner

v.

THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent;

PEOPLE, Real Party in Interest

Real Party in Interest's petition for rehearing DENIED.

Bird

Chief Justice

EXHIBIT C

SUPREME COURT
FILED
DEC 01 1980
LAURENCE P. GILL, Clerk
Deputy

L.A. No. 31668

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CLEROW WILSON, Petitioner

v.

THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, Respondent;

PEOPLE, Real Party in Interest

The application for stay of issuance of the peremptory writ herein, is DENIED.

Bird

Chief Justice

JAN 17 1984

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 10, 1984

Roderick W. Leonard, Esq.
Deputy District Attorney
849 South Broadway, 11th Floor
Los Angeles, California 90014-3570

RE: California v. Clerow Wilson
A-544

Dear Mr. Leonard:

Your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed thereon the following:

" 1/10/84 - Denied
W.H.R."

Very truly yours,

ALEXANDER L. STEVAS, Clerk

By Katherine Downs

Katherine Downs
Assistant Clerk

gtb
cc: Paul F. Moore, II, Esq.

FEB 2 1984

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 27, 1984

Mr. Robert H. Philibosian
District Attorney
949 S. Broadway, 11th Floor
Los Angeles, CA 90014-3570

Re: California,
v. Clerow Wilson
No. 83-1222

Dear Mr. Philibosian:

The petition for a writ of certiorari in the above entitled case was docketed in this Court on January 21, 1984 as No. 83-1222.

Forms are enclosed for notifying opposing counsel that the case was docketed. Also enclosed is a form for the entry of your appearance as counsel.

Very truly yours,

Alexander L. Stevas, Clerk

by

Francis J. Lorson
Chief Deputy Clerk

Enclosures

Office - Supreme Court, U.S.
FILED
FEB 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1222

IN THE

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CLEROW WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

RESPONDENT'S BRIEF IN OPPOSITION.

PAUL F. MOORE II,
Attorney at Law,
2049 Century Park East,
Los Angeles, Calif. 90067,
(213) 553-1111,
Attorney for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Question Presented for Review.

Does a "seizure" occur within the meaning of the Fourth Amendment to the United States Constitution when police officers randomly approach a citizen, ask for a minute of his or her time, and upon acknowledgment:

1. Informs that person that they are narcotics officers conducting an investigation; and,
2. Informs that person that they have received information that he or she is carrying a large quantity of drugs; and,
3. Asks that person if he or she is in possession of any drugs; and
4. Asks for permission to search that person's luggage, briefcase, purse or pockets.

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No. 83-1222

IN THE

Supreme Court of the United States

October Term, 1983

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

CLEROW WILSON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Facts.

On March 10, 1981, at approximately 11:30 A.M., Detective Kaiser, an undercover narcotics officer with the Los Angeles Police Department, and his partner, Deputy Gary Frederick of the Los Angeles County Sheriff's Department, dressed in plainclothes, went to the Pan American Airlines arrival area at the Los Angeles International Airport. (R.T. 116-117). The officers were monitoring flights from Florida on a daily basis in order to arrest persons transporting narcotics into the State from Florida. (R.T. 119-120). On this day, Detective Kaiser observed Mr. Wilson exit Flight 440 from Miami. With Mr. Wilson was another man, later identified as his nephew, Rashon Wilson. (R.T. 117-118). Detective Kaiser recognized Mr. Wilson from television appearances and knew that he was recognized in the community as a celebrity. (R.T. 128).

Detective Kaiser testified that he was not expecting to see Mr. Wilson get off the plane, nor had he prior to that date received any information that Mr. Wilson was involved in any kind of illegal activity. (R.T. 119, 127).

Detective Kaiser observed nothing unusual about Mr. Flip Wilson (R.T. 130), but testified that Mr. Rashon Wilson made eye contact with him twice, which was consistent with the behavior of drug couriers he had arrested in the past. (R.T. 121). Detective Kaiser was relying on his experience, but he could not articulate his feelings of suspicion to differentiate the eye contact of drug couriers from the eye contact of non-drug couriers. (R.T. 132). He finally conceded that Mr. Rashon Wilson may well have been looking for someone who was meeting the plane and that this eye contact in and of itself was not particularly noteworthy. (R.T. 133-135).

Mr. Flip Wilson was carrying an attache case and Mr. Rashon Wilson was carrying a box. Detective Kaiser testified that there was nothing unusual about these items. (R.T. 141). The two Mr. Wilsons were then met by Mrs. Flip Wilson and all three exited the building to the sidewalk. Mr. Flip Wilson thereafter put the attache case and box on the rear seat of his car which was at the curb and Rashon went to the baggage claim area.

Detective Kaiser and Deputy Frederick followed Rashon and as he exited the baggage claim area approached him and displayed police identification. Deputy Frederick spoke with him.

Thereafter, Detective Kaiser approached Mr. Flip Wilson, who was standing at the open trunk of the vehicle[1] for the purpose of gaining his consent to search his luggage.

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[1]Wilson testified that when Kaiser first approached him, he was seated in the driver's seat of the car and Kaiser leaned through an open rear door. (R.T. 187, 190).

(R.T. 149). Detective Kaiser displayed his police identification, informed him that he was a police officer, and asked if he might have a minute of his time. Mr. Wilson said "Sure." (R.T. 124).

Detective Kaiser then informed him that he was "conducting a narcotics investigation and that he had received information that he would be arriving today from Florida carrying a lot of drugs."[2]

Detective Kaiser, then without any prior *Miranda*[3] warnings, asked Mr. Flip Wilson if he had any drugs with him. (R.T. 151). Mr. Wilson denied knowledge of any drugs. (R.T. 125). Detective Kaiser then asked if he could search Mr. Wilson's luggage which had been retrieved and was resting on the sidewalk next to the car. Mr. Wilson assented. (R.T. 124). Detective Kaiser then turned his attention to the attache case on the back seat of the car and again asked for permission to search. Mr. Wilson is alleged to have said, "There should only be some papers in there, but you can go ahead and look if you'd like."[4] (R.T. 125). The con-

---

[2]Detective Kaiser testified that this information came from his partner, Deputy Frederick, who received it from some anonymous third person. (R.T. 146-147). The prosecution declined to call Deputy Frederick as a witness and the trial court sustained defense counsel's objection to the use of this information to support the validity of the police conduct. The People have not challenged this ruling. (R.T. 176-177).

[3]*Miranda v. Arizona* (1966) 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484.

[4]Mr. Flip Wilson testified that in response to Detective Kaiser's request to search the attache case he said:

Mr. Wilson: I said, "I would prefer that you didn't."
And he said, "Are you telling me that I cannot search the attache case?"
I said, "I would prefer that you didn't."
He said, "Are you refusing to allow me to search the attache case?"
And I said, "Sir, I am telling you that I would prefer that you didn't."
And he said, "I am not concerned if you're carrying just a small quantity for your personal use. I'm only concerned with a large quantity."
I said, "Since you put it in those terms, okay."
So I turned around in the seat, and I leaned over the back of the driver's seat, and I opened the attache case and I raised the lid.
(R.T. 191-192).

traband was recovered after Mr. Wilson opened the attache case for Detective Kaiser. Detective Kaiser then asked Mr. Wilson "*If he would mind* accompanying me back to my narcotics office situated at the airport. . . ." (R.T. 126). (Emphasis added) At the time of this request, Mr. Wilson was technically under arrest (not free to go) but this was not communicated to him. (R.T. 153).

Procedural History.

1. Mr. Wilson was charged with violation of California Health and Safety Code Sections 11350(a) and 11357(a). In the trial court, a motion to suppress the evidence was made pursuant to Section 1538.5(i) of the California Penal Code. This motion alleged that the seizure of the evidence was made in violation of both the Federal and State Constitution. This motion was denied. (R.T. 251).

2. The defense filed a Petition for Writ of Mandate in the Court of Appeal. This request for hearing was summarily denied on January 22, 1982. A Petition for Hearing to the California Supreme Court was granted on February 18, 1982 and the matter was retransferred to the Court of Appeal of the State of California, Second Appellate District, Division One with directions to hear in light of two California Supreme Court cases — *In re Tony C.* (1978) 21 Cal. 3d 888, 148 Cal. Rptr. 366, and *People v. Bower* (1979) 24 Cal. 3d 638, 156 Cal. Rptr. 856. (Appendix A). Following the hearing in the State Court of Appeal, a divided court denied the issuance of a writ. In dissent, Justice Dalsimer wrote strongly that Mr. Wilson had been seized in violation of his Federal Constitutional rights.[3]

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[3]Justice Dalsimer, in his dissenting opinion, writes:

"Any 'reasonable person' upon being confronted by a man who identified himself orally and by display of credentials as a police officer and who states that he is conducting a narcotics investigation of the accosted person based on information that such person was arriving at the scene carrying a lot of drugs would believe that he was not free to leave. Indeed, if under all of those circumstances a person believed that he was free to leave, not only would he be 'unreasonable' but also he would be out of touch with reality."

(Dissent at page 257B Appendix to Petition).

3. A second Petition for hearing to the California Supreme Court was granted and on October 20, 1983, in a unanimous opinion authored by Justice Kaus, ruled that Mr. Wilson had been seized in violation of his Federal Fourth Amendment rights. Although the Court had earlier cited California Supreme Court cases interpreting the California Constitution in retransferring the matter to the Appellate Court, no opinion was expressed as to independent state grounds for granting the writ of mandate.

4. Petitioner on December 8, 1983, requested a stay of the peremptory writ and remittitur in the California Supreme Court. This request was denied by Chief Justice Bird on December 21, 1983. (Appendix B).

5. Petitioner then sought a stay from the Honorable William H. Rehnquist, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit. This request was denied on January 10, 1984. (Appendix C).

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI.

I.

The Unanimous Judgment of the California Supreme Court Was Correct and Relied Upon Established Principles of Federal Law.

In 1968, this Court established a test for when a "seizure" occurs within the meaning of the Fourth Amendment.

> ". . . when the officer, by means of physical force or show of authority, has *in some way* restrained the liberty of a citizen [we may] conclude that a 'seizure' has occurred." *Terry v. Ohio* (1968) 392 U.S. at 19, Note 16; 20 L.Ed. 2d 889, 88 S.Ct. 1868. *Emphasis added.*

This test has been reinforced by Justice Stewart's separate opinion in *United States v. Mendenhall*, 446 U.S. 544, 554, 75 L.Ed. 2d at p. 239, 103 S.Ct. at p. 1326, wherein he writes: "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." The California Supreme Court noted that this has the support of a "substantial majority — and perhaps all — of the Supreme Court Justices." *Wilson v. Superior Court* (1983) 14 Cal. 3d 777 at 790. The Court elaborated:

> "Six members of the present court have either authored or joined in opinions explicitly endorsing the *Mendenhall* standard. Justices White, Marshall, Powell and Stevens signed the lead opinion in *Royer*; Justice Blackmun expressly approved that standard in his dissent in *Royer*; and Justice Rehnquist joined in the relevant portion of Justice Stewart's opinion in *Mendenhall* itself. Of the three remaining justices, Chief Justice Burger joined Justice Powell's concurring opinion in *Reid*, which — at the least — strongly hinted its ap-

proval of the *Mendenhall* test, and Justice Brennan appears to have applied the *Mendenhall* standard in his discussion of the detention issue in his concurring opinion in *Royer*. Only Justice O'Connor, who was not on the court when *Mendenhall* and *Reid* were decided, has not indicated her views on the issue."

Wilson v. Superior Court, supra, p. 790, Note 10.

Thus, the California Supreme Court correctly phrased the question as ". . . whether, at the time Wilson consented to the search of his attache case, a reasonable person in Wilson's position would have believed that he was not free to leave." *Wilson v. Superior Court, supra,* at 790.

The Court concludes:

". . . it is evident that Detective Kaiser did not detain Wilson, for federal constitutional purposes, merely by approaching him, identifying himself as a police officer; and asking if he might have a minute of his time. At that point, however, the officer did not simply ask Wilson if he would permit a search of his luggage. Instead, he advised Wilson that he was conducting a narcotics investigation and that he 'had received information that he [Wilson] would be arriving today from Florida *carrying a lot of drugs*.' (Emphasis added). Common sense suggests to us that in such a situation, an ordinary citizen, confronted by a narcotics agent who has just told him that he has information that the citizen is carrying a lot of drugs, would not feel at liberty simply to walk away from the officer."

. . .

"Once the officer advised Wilson that he had information that Wilson was carrying a lot of drugs, the entire complexion of the encounter changed and Wilson could not help but understand that at that point he was the focus of the officer's particularized suspicion. Under these circumstances — and particularly in the ab-

sence of any clarifying advice from the officer explaining to Wilson that he was in fact free to drive away if he desired — no reasonable person would believe that he was free to leave. (See *United States v. Berry*, 5th Cir. 1982, 670 F.2d 583, 597; *United States v. Robinson*, 5th Cir. 1980, 625 F.2d 1211, 1216-1217)."

Wilson v. Superior Court, supra, at 790.

II.

There Is No Substantial Federal Question at Issue.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." 28 U.S.C., *Supreme Court Rule* 17.1. This case presents no legal innovation, no dispute as to applicable law, no conflict among the State Courts, and no conflict among the Federal Circuit Courts of Appeal. Petitioner does not request a new test or standard for when a "seizure" occurs, but urges a reassessment of the facts of this case as applied to the recognized standards of law. This Court has long held that:

> "It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is important to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."
> *Layne Bowler Corp. v. Western Wall Works, Inc.* (1923) 43 S.Ct. 422, 423, 261 U.S. 387, 393, 67 L.Ed. 712 (per Taft, C.J.).

III.

A Ruling in Favor of Petitioner Would Erode the Supervisory Powers of the Court and Lead to Random and Arbitrary Police Conduct.

The requirement that a police officer must have probable cause or some objective "articulable suspicion" before that officer may "detain" or "seize" an individual for ques-

tioning insures that a standard will be maintained with which to measure individual police conduct. In the absence of such a standard and judicial review, police are permitted to act in an arbitrary and random manner. The instant case presents facts which provide "no articulable suspicion." The California Supreme Court, analyzing the facts in light of this Court's opinion in *Reid v. Georgia* (1980) 448 U.S. 438 [65 L.Ed. 2d 890, 100 S.Ct. 2752] wrote:

> "We conclude as a matter of law that the police did not have an objective, articulable basis to justify a detention of Wilson."[6]
>
> *Wilson v. Superior Court, supra,* at 786.

A contrary ruling on the issue raised in the petition would permit police officers to randomly approach citizens in public places, politely ask for a "minute of time" and then fabricate accusatory information in order to psychologically hold the citizen in their presence while interrogation continues and "requests" to search purses, pockets, automobiles or brief cases are made. If no Fourth Amendment rights are implicated, no judicial review of police conduct is possible, and police will be encouraged to randomly, arbitrarily and deceptively invade the privacy of citizens. This is inimical to a society ruled by law and not by men.

CONCLUSION.

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL F. MOORE II,

Attorney at Law,

Attorney for Respondent.

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[6]The California Supreme Court points out that had the alleged information regarding Mr. Wilson arriving from Florida with "a lot of drugs" been substantiated with relevant testimony, there might have been a reasonable basis for the detention. However, ". . . the prosecution — despite fair warning — failed to present the relevant testimony." *Wilson v. Superior Court, supra,* at 791.

APPENDIX A.

2d Civil No. 64102.

In the Supreme Court of the State of California, in Bank.

Clerow Wilson, etc., Petitioner, v. The Superior Court of Los Angeles County, Respondent; PEOPLE, Real Party in Interest.

Filed: February 18, 1982.

Petition for hearing GRANTED. The matter is transferred to this court and retransferred to the Court of Appeal, Second District, Division One, with directions to issue an alternative writ to be heard before that court when the proceeding is ordered on calendar. (See People v. Bower, 24 Cal. 3d 638, 643 and In re Tony C. 21 Cal 3d 888, 895-896,)

Chief Justice

MOSK,

Justice

NEWMAN,

Justice

KAUS,

Justice

BROUSSARD,

Justice

APPENDIX B.

L.A. No. 31668.

In the Supreme Court of the State of California, in Bank.

Clerow Wilson, Petitioner v. The Superior Court of the County of Los Angeles, Respondent; People, Real Party in Interest.

Filed: December 21, 1983.

The application for stay of issuance of the peremptory writ herein, is DENIED.

/s/ Bird
Chief Justice

APPENDIX C.

[Letterhead]

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D.C. 20543

January 10, 1984

Roderick W. Leonard, Esq.
Deputy District Attorney
849 South Broadway, 11th Floor
Los Angeles, California 90014-3570

RE: California v. Clerow Wilson
A-544

Dear Mr. Leonard:

Your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed thereon the following:

"1/10/84 — Denied
W.H.R."

Very truly yours,
ALEXANDER L. STEVAS, Clerk
By
Katherine Downs
Assistant Clerk

gtb
cc: Paul F. Moore, II, Esq.